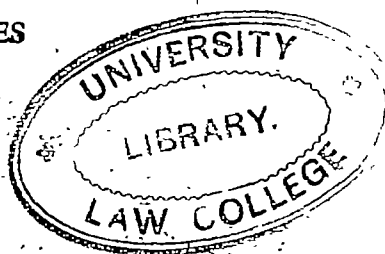


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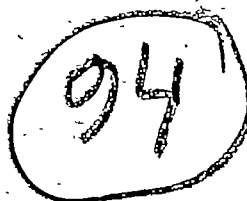
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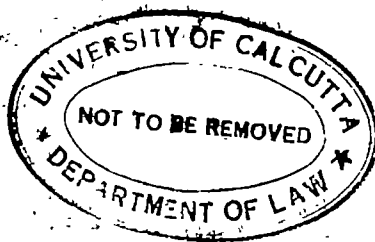


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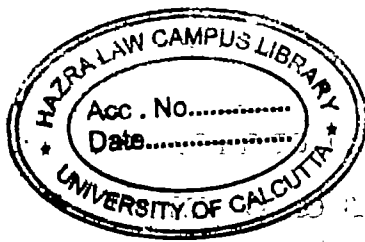
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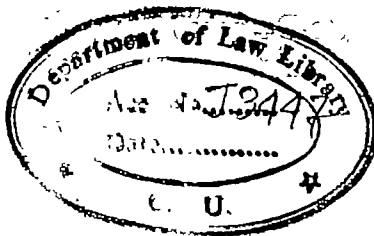
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Judges of the High Court

1954.

Chief Justice.

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Puisne Judges.

The Hon'ble Mr. Justice R. P. Mookerjee, M.A. LL. B.

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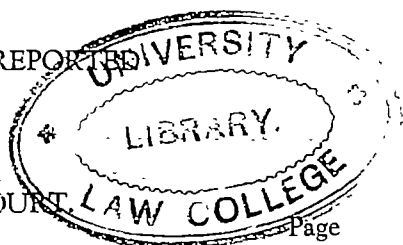
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I

SUPREME COURT.

APPELLATE CIVIL.

*Before Mr. Justice Bijan Kumar Mukherjee, Mr. Justice
N. H. Bhagwati and Mr. Justice B. Jagannadhadas.*

THE CENTRAL NATIONAL BANK LTD.

v.

THE UNITED INDUSTRIAL BANK LTD.*

CIVIL.

1953.

November, 26.

Sale of Goods Act—Section 30(2)—Agreement to sell—Buyer in possession of the goods—Rights of the bona fide transferee for consideration without notice of seller's lien—Consent of the seller, import of—Consent obtained by fraud or misrepresentation, good binding consent within Section 30(2) of the Indian Sale of Goods Act.

Sale of Goods Act, Section 30(2)—Possession of goods by the buyer without the seller's "consent"—Goods transferred by the buyer—In such cases, transferee for value without the seller's lien, not protected by Section 30(2) of the Sale of Goods Act.

The word "consent" as used in Section 30(2) of the Sale of Goods Act means "agreeing on the same thing in the same sense" as defined in Section 13 of the Indian Contract Act.

A consent induced by false representation may not be a "free consent," but it can nevertheless be real, and ordinarily the effect of fraud or misrepresentation is to render a transaction voidable only and not void. If an innocent purchaser or pledgee obtains goods from the person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the rights of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined

* Civil Appeal No. 32 of 1953 from the Judgment and Decree dated the 13th March 1951 of the High Court of Judicature at Calcutta (*Harries C.J. and Banerjee J.*) in Appeal from Original Decree dated the 21st March 1950 of the Calcutta High Court in its ordinary original Civil Jurisdiction in Suit No. 1112 of 1946.

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it is sufficient to enable him to create title in favour of an innocent transferee for value without notice.

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Ltd.

November, 26

The position, however, is entirely different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. In such cases, the owner can never have consented to the possession of goods, and the so-called consent being not a real consent is a totally void thing in law.

The position, therefore, is that when the transfer of possession is voidable merely by reason of its being induced by fraud, which can be rescinded at the option of the owner, the consent which followed false representation is a sufficient consent within the meaning of Section 30(2) of the Sale of Goods Act. But where the fraud induced an error regarding the identity of the person to whom or the property in respect of which possession was given, the whole thing is void and there is no consent in the sense of agreement of two persons or the same thing in the same sense. Even if the owner was induced by to part with the goods by fraudulent misrepresentation he must yet be held to have consented to give possession; and the fact that the receiver had a dishonest intention or a preconceived design to steal or misappropriate the goods and actually misappropriated them, may make him liable for criminal offence, but the consent of the owner actually given cannot be annulled thereby

Appeal by the Plaintiff Bank.

Suit for a declaration that the Plaintiff Bank acquired the rights of a pledgee in respect of certain shares in two companies.

The material facts will appear from the judgment.

P. C. Mullick and A. K. Dutt for the Appellant.

Sankar Banerjee, B. Das and S. N. Mukherjee for the Respondents.

The judgment of the Court was as follows:—

B. K. Mukherjee, J.:—This appeal is directed against a judgment and decree of an appellate bench of the Calcutta High Court dated the 12th of March 1951 reversing, on appeal, the decision of a single Judge of that court passed in Suit No. 1112 of 1946.

The suit, out of which this appeal arises, was commenced by the Central National Bank Limited, the appellant before us, in the Original Side of the Calcutta High Court, for a declaration that the bank acquired the rights of a pledgee in respect of two blocks of shares in two companies, *to wit*, the Indian Iron and Steel Company Ltd. and the Steel Corporation of Bengal Ltd. and was entitled to sell the shares in enforcement of the pledge. There was a claim for recovery of possession of these shares and also for damages alleged to have been suffered by the plaintiff by reason of wrongful denial of its title by the defendant bank.

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The shares, to which the dispute relates, are 800 in number and admittedly they were the property of one Radhika Mohan Bhuiya, the defendant No. 2 in the suit. Sometime in February 1946 Bhuiya agreed to sell these shares to one Dwijendra Nath Mukherjee for the price of Rs. 38,562/8/-. On 14th February 1946, Bhuiya sent these shares along with the relative transfer deeds to the defendant bank with instructions to deliver over the share certificates and the transfer deeds to the purchaser, against payment of the entire consideration money stated above. On the 18th of February following the defendant Bank directed one of its officers, *to wit*, Nilkrishna Paul, to see Mukherjee at his office and hand over to him the shares after receiving from him a pay order for the sum of Rs. 38,562/8/- signed by the Punjab National Bank. In accordance with this direction, Paul went to the office of Mukherjee and saw him at his chamber at about 11 a.m. in the morning. Mukherjee asked for the shares, but Paul refused to make over the share certificates to him unless the pay order was given. Mukherjee then said that he wanted to have a look at the shares and the transfer deeds just to satisfy himself that they were all right. After that Paul placed the shares and the transfer deeds on the table. Mukherjee examined the share certificates one after another and when he was about to leave the chamber along with the share certificates and the blank transfer deeds, Paul raised an objection and asked him not to go away without giving him the pay order. Mukherjee then said to Paul: "I am going out to get the pay order; it is ready. You take your seat; I am coming." With these words Mukherjee went out of his chamber and did not return there-

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after. It appears that he went straight to the office of the plaintiff bank and pledged the shares with it, taking an advance of Rs. 29,000/- in terms of an agreement which was previously arrived at between them. What happened in substance was this: Mukherjee gave a cheque for Rs. 100/- with which an account in his name was opened for the first time with the plaintiff bank, and the advance of Rs. 29,000/- was given to Mukherjee by way of overdraft on this current account. Mukherjee also executed a promissory note for the said amount in favour of the plaintiff. It is the common case of the parties that Mukherjee has not been heard of since then and his present whereabouts are unknown. Coming now to Paul, the defendant's officer, after waiting vainly for Mukherjee, he had no other alternative but to come back to his office and inform his superior officer of all that had happened. A complaint was then lodged with the police on behalf of the defendant bank. The cheque, which was given to the plaintiff by Mukherjee, was dishonoured when it was presented for payment. The plaintiff bank thereupon wrote a letter to Mukherjee demanding payment of the loan at once and threatening to sell the shares in case of default. As no reply came from Mukherjee, the plaintiff sold these shares through a broker named Jalan. Jalan took delivery of the shares and gave the plaintiff a cheque for Rs. 16,000 in part payment of the price. The payment of the cheque, however, was stopped and the police, who had already taken the matter in hand, took possession of the shares. As Mukherjee could not be traced, a criminal case was started against an alleged accomplice of his, named Shaw, but this proved unsuccessful and Shaw was acquitted. The defendant bank, who had paid the full price of these shares to Bhuiya, then presented an application to the Magistrate, praying that the shares might be returned to it on the ground of its being the owner thereof. On getting information of this application, the plaintiff bank instituted the present suit, the allegation in substance being that the plaintiff being the pledgee of the shares was entitled, in law, to the possession thereof. As has been stated already, Bhuiya having been paid off by the defendant bank, had no further interest in the litigation. The fight was thus entirely between the two banks.

It is not disputed that Mukherjee did not acquire any legal title to the shares. There was only an agreement for sale

between him and Bhuiya, and under the terms of the contract the property in the shares could not pass to him till the price was paid. The plaintiff bank, therefore, was not a pledgee of the shares from the real owner. It rested its claim entirely upon the provision of section 30(2) of the Indian Sale of Goods Act, the language of which is as follows:—

“Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.”

The plaintiff's case was that it received the shares by way of pledge in good faith and without notice of any defect in the title of Mukherjee who had agreed to purchase these shares from Bhuiya and had actual possession of the same with the consent of the seller. Consequently, the pledge would be effective under the provision of section 30(2) of the Sale of Goods Act in the same way as if the right of the original seller did not exist.

The contention of the defendant bank on the other hand was that Mukherjee was not in possession of the shares with the consent of the seller, nor was the plaintiff a *bona fide* pledgee without notice of the defect of title. The whole controversy thus centered round the point as to whether on the facts that transpired in evidence, the plaintiff bank was entitled to avail itself of the provision of section 30(2) of the Indian Sale of Goods Act. Mr. Justice Sarkar of the Calcutta High Court, who tried the suit, decided this question in favour of the plaintiff. The learned Judge was of opinion that Mukherjee had obtained possession of the shares with the consent of Bhuiya or rather his agent, the bank officer, within the meaning of section 30(2), Indian Sale of Goods Act, and it was not at all material for purposes of this sub-section that the consent was induced by

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fraud of Mukherjee or that his act amounted to an offence of 'larceny by trick' according to English law. It was further found that the plaintiff acted in good faith without notice of any defect of title; and in view of these findings the trial judge decreed the plaintiff's suit.

There was an appeal by the defendant against this judgment which was heard by a bench consisting of Trevor Harries, C.J. and Banerjee, J. The learned Judges allowed the appeal and reversed the judgment of the trial court holding that the defendant's agent never consented to Mukherjee's obtaining possession of the shares as buyer. There was no intention to give delivery at all. It was Mukherjee, who took the shares and bolted and "his act was as much theft as if he had taken them out of Nilkrishna Paul's pocket." It is against this decision that the present appeal has come before us at the instance of the plaintiff and the point for consideration is, whether the view taken by the appellate bench of the High Court is right?

Mr. Mullick, who presented the appellant's case with commendable fairness and ability, has argued before us that on the facts of this case the appellate court ought to have held that the plaintiff did acquire the rights of a pledgee in respect to the disputed shares under the provision of section 30(2), Sale of Goods Act. There is no dispute, he says, that there was a valid contract of sale regarding these shares between Bhuiya, the real owner and Mukherjee; and that the plaintiff was a *bona fide* pledgee from Mukherjee without notice of any other's rights, has been found as a fact by the trial judge and this finding has not been reversed in appeal. The only other thing necessary to entitle the plaintiff to claim the protection of section 30(2) of the Act is to show that Mukherjee obtained possession of the shares with the consent of the seller or his agent, and it is on this point alone that the courts below have taken divergent views. It is argued by the learned counsel that the word "possession" used in the section means nothing else but physical custody and whether there was consent of the owner or not has to be determined with reference the definition of "consent" as given in section 13 of the Indian Contract Act. If there was consent in fact, it is immaterial that it was induced by fraud or misrepresentation and in the determination of this matter,

no principle of criminal law and much less the technicalities of the English Criminal law should be imported. On the facts the learned counsel argues that the defendant's agent really consented to part with the possession of the shares and allow Mukherjee to have them, although he was duped by the false promise given by Mukherjee which the latter never intended to keep.

The propriety of the propositions of law put forward on behalf of the appellants has not been, for the most part, controverted by Mr. Banerjee, who appeared for the defendant respondent. The dispute between them, as we shall presently see, is mainly on the point as to whether, on the facts of the case, it could be held that Mukherjee got possession of the shares with the consent of the defendant's agent. As, however, the points of law have been discussed in the judgments of the courts below and reference has been made by the learned Judges to a number of English cases turning upon analogous provisions in cognate statutes in England, we think it proper to express our views shortly on the points raised, just for the purpose of clearing up any doubt that might exist regarding the meaning and implication of the word "consent" as has been used in section 30(2) of the Sale of Goods Act. The two principal questions that require consideration are: first, whether the consent necessary under section 30(2) of the Sale of Goods Act must be a free consent uninfluenced by fraud or false representation, and secondly, whether the existence of such consent is negatived, as a matter of law, if a person of the requisite description mentioned in the section obtains possession of goods from the owner by trick or other deceitful means which makes his act punishable as a crime. There is no decision on these points by any High Court in India and we have been referred to a number of cases decided by English courts where similar questions have arisen in regard to the provisions of section 25 (2) of the English Sale of Goods Act and section 2(1) of the Factors Act which employ almost the same language with reference to dispositions made by a purchaser or mercantile agent who obtained possession of goods with the consent of the real owner. It is neither necessary nor desirable for our purpose to enter into a detailed discussion of the English cases that have been cited before us. We would only examine, where necessary, the salient principles upon which

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the leading pronouncements of the English Judges purport to be based and see whether they throw any light on the questions that require consideration in this case.

We agree with the learned counsel on both sides that the word "consent" as used in section 30 (2) of the Sale of Goods Act means "agreeing on the same thing in the same sense" as defined in section 13 of the Indian Contract Act. There is no definition of "consent" in the Sale of Goods Act itself, but section 2 (15) of the Act definitely lays down that the expressions used and not defined in the Act, but which are defined in the Indian Contract Act shall have the same meaning as has been assigned to them in the latter Act. Section 14 of the Contract Act defines the expression "free consent" and a consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. A consent induced by false representation may not be free, but it can nevertheless be real, and ordinarily the effect of fraud or misrepresentation is to render a transaction voidable only and not void. If an innocent purchaser or pledgee obtains goods from the person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the rights of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined it is sufficient to enable him to create title in favour of an innocent transferee for value without notice. This proposition is well recognised in English law and seems to us to be well founded on principle. In *Cahn v. Pockett's Bristol Channel Steam Packet Company* (1), Collins, L.J. made the following oft quoted observation:—

"However fraudulent a person in actual custody may have been, in obtaining the possession, provided it does not amount to larceny by trick and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can, by his disposition, give a good title to the purchaser.

(1) [1899] 1 Q.B. 643 at 659.

The opinion of the learned Judge in regard to the so-called exception where there is a 'larceny by trick' has been the subject of much comment both favourable and adverse in later cases as we shall see presently; but the main proposition enunciated by him has never been disputed vide the cases referred to by Scrutton, L.J. in *Folkes v. King* (1). The law on this point has been thus summed up by Denning, L.J. in *Pearson v. Rose* (2):

"The effect of fraud is as a rule only to make the transaction voidable and not void, and if, therefore, an innocent purchaser has bought the goods before the transaction is avoided the true owner cannot claim them back. For instance, if a mercantile agent should induce the owner to pass the property to him by some false pretence as by giving him a worthless cheque, or should induce the owner to entrust the property to him for display purposes, by falsely pretending that he was in a large way of business when he was not, then the owner cannot claim the goods back from an innocent purchaser who has bought them in good faith from the mercantile agent. The consent may have been obtained by fraud but, until avoided it is a consent which enables the Factors Act to operate."

Thus obtaining possession of goods by false pretences does not exclude the operation of the Factors Act in England and in our opinion it does not exclude the operation of section 30 (2) of the Sale of Goods Act in India.

The position, however, is entirely different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. Thus A might obtain possession of goods from the owner by falsely representing himself to be B. In such cases the owner can never have consented to the possession of goods by A; the so-called consent being not a real consent is a totally void thing in law. In *Lake v. Simmons* (3),

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(1) [1923] 1 K.B. 282 at 301.

(2) [1950] 2 A.E.R. 1027 at 1032.

(3) [1927] A.C. 487, 500.

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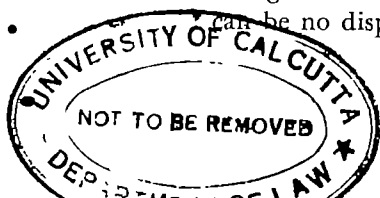
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Lord Haldane made the following observations while dealing with a similar point:

"The appellant thought that he was dealing with a different person, the wife of Vander Borgh and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The latter was entirely deceived as to the identity of the person with whom he was transacting. In circumstances such as these, I think that there was no *consensus ad idem*."

The position, therefore, is that when the transfer of possession is voidable merely by reason of its being induced by fraud, which can be rescinded at the option of the owner, the consent which followed false representation is a sufficient consent within the meaning of section 30 (2) of the Sale of Goods Act. But where the fraud induced an error regarding the identity of the person to whom or the property in respect of which possession was given, the whole thing is void and there is no consent in the sense of an agreement of two persons on the same thing in the same sense.

The other question that requires consideration is, whether it would make any difference in the application of the principles stated above if the fraud or deception, practised by a person in obtaining possession of goods from the owner, is of such a character as to make him guilty of a criminal offence? Having regard to what has been said above, this question should not present any difficulty, had it not been for the fact that an amount of complexity has been introduced into the subject by reason of certain technical rules of the English criminal law. It is to be remembered that, what section 30 (2) of the Sale of Goods Act contemplates, is that the buyer, to whom the property in the goods sold has not passed as yet, must obtain possession of the goods with the consent of the seller before he can give a title to an innocent purchaser or pledgee. There can be no dispute that to establish consent of the owner of the



goods, it is his state of mind that is the only material thing for consideration and not that of the receiver of the goods. Even if the owner was induced to part with the goods by fraudulent misrepresentation he must yet be held to have consented to give possession; and the fact that the receiver had a dishonest intention or a preconcerted design to steal or misappropriate the goods and actually misappropriated them, may make him liable for a criminal offence, but the consent of the owner actually given cannot be annulled thereby. In order that a fraudulent receiver of goods must be punished criminally, the material thing is his dishonest intention; but as was said by Bankes, L.J. in *Folkes v. King* (1), that is altogether immaterial for the purpose of determining whether there was consent on the part of the owner of the goods under the Factors Act. "The two considerations", observed the learned Judge, "should be entirely distinct. To allow the one to be defeated by consideration of the other is in my opinion to sweep away a great part of the protection which the Factors Act was intended to provide. The same ratio, in our opinion, applies in regard to the provisions of the Sale of Goods Act.

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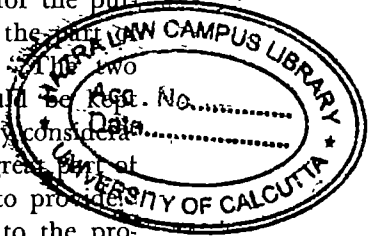
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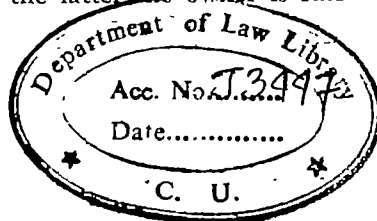
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As has been said already, obtaining of goods by false pretences does not negative consent of the owner of the goods for purposes of the English Factors Act. Even a larceny by bailee does not exclude consent according to the English decisions. This means that if the owner allows an agent to have his goods on hire or for repair and the agent later on makes up his mind to steal or misappropriate them and sells them to another, the agent may be guilty of larceny as bailee but the owner's consent to his possession could not be affected thereby. But curiously enough in English law a difference is made between larceny by bailee and larceny by trick; and if in the illustration given above the agent instead of making up his mind subsequently to steal the goods had that dishonest intention at the very beginning when he got possession, he is guilty of 'larceny by trick' and the possession in law is deemed to remain with the owner and he is regarded as "taking" without the owner's consent. This apparently involves a legal fiction, for although the goods are actually delivered over by the owner to the accused person, yet because of the trick committed by the latter the owner is still

(1) [1923] 1 K.B. 282 at 297.



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supposed to continue in possession of the goods and the accused is held guilty of larceny for taking possession of the goods against the will of the owner. Ordinarily, the offence of larceny by trick, according to the English law, can be committed in two ways: first, where the owner of goods, being induced thereto by trick, voluntarily parts with the possession of goods in favour of the accused but does not intend to pass property therein and the recipient has the *animus furandi*. Secondly, when the accused contrives to get possession of goods by representing himself to be some other person or by deceiving the owner into thinking that he was delivering different goods vide *Whitehorn v. Davison* (1). In the second class of cases, there is no real consent on the part of the owner and when a larceny by trick of this type is committed, it is well settled in England that the operation of the Factors Act would be excluded. The position under the Indian law is the same in accordance with the principles explained above.

With regard to the first category of cases, however, the decisions of the English courts are not at all uniform. As has been said already, Collins, J. in *Cahn v. Pockett's Bristol Channel etc.* (2), made the observation that "however fraudulent a person in actual custody may have been, in obtaining possession, provided it did not amount to larceny by trick. . . . he can by his disposition give a good title." The observation as regards the exception in case of larceny by trick though it could not rank higher than an obiter, was accepted as good law by the Court of Appeal in England in *Oppenheimer v. Frazer* (3). On the other hand, it was held by Bankes, L.J. and Scrutton, L.J. in *Folkes v. King* (4), that when consent was in fact given by the owner of the goods, it was immaterial that the receiver was guilty of larceny by trick, and this view was approved of by the majority of the Court of Appeal in *Lake v. Simmons* (5), though Atkin, L.J. delivered a dissenting judgment. The decision in *Lake v. Simmons* (6), was reversed by the House of Lords but Their Lordships proceeded not on any technical doctrine of criminal law but on the broad ground which we have already discussed that there was a

(1) [1911] 1 K.B. 463, 479

(3) [1907] 2 K.B. 50

(5) [1926] 2 K.B. 51.

(2) [1899] 1 Q.B. 643 at 659

(4) [1923] 1 K.B. 282.

(6) [1927] A.C. 487.

mistake fatal to there being a consenting mind at all. The view taken in *Folkes v. King* (1), has been approved of in the recent decision of *Pearson v. Rose* (2). Thus, to quote the language of Lord Sumner, "there is a signal and indecisive conflict of authoritative opinion on this point vide *Lake v. Simmons* (3)." In our opinion, the view taken in *Folkes v. King* (1), is the proper view to take; and if, as was said by Scrutton, L.J. in that case, the Parliament could not possibly have intended to apply the artificial distinctions of criminal law to a commercial transaction governed by the Factors Act, there is still less justification for importing a highly technical rule of English criminal law which had its origin in a legal fiction devised by English Judges to punish a thief, who would otherwise have escaped conviction, into the provisions of the Indian Sale of Goods Act. Whether there is consent or not has to be proved as a fact in accordance with the principles of the Law of Contract and when it is proved to exist, its existence cannot be nullified by application of any rule of criminal law.

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It is in the light of these principles that we would proceed now to examine the facts of this case. The whole question is, whether Mukherjee got possession of the shares with the consent of the seller, and it is not disputed that the consent of the defendant's clerk, who was acting as the agent of the owner, would be as effective as the consent of the owner himself.

As has been said already, Bhuiya sent the shares to the defendant bank on the 14th of February 1946. The letter written by him to the defendant on that date concludes as follows:

"I shall be highly obliged if you kindly realise the sum of Rs. 38,562/8/- as per the enclosed bill from Mr. D. N. Mukherjee and deliver the shares to him and credit the realised sum to my account No. 1 and oblige."

On the next day, that is to say on the 15th, Bhuiya wrote to Mukherjee informing him that he had deposited in the Bara-

(1) [1923] 1 K.B. 282.

(2) [1950] 2 A.E.R. 1027.

(3) [1927] A.C. 487 at 510.

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bazar branch of the United Industrial Bank, 300 Iron and 500 Steel Corporation shares and Mukherjee was requested to take delivery of the shares against payment immediately. On the 18th of February following, Nilkrishna Paul, an old employee in the Cash Department of the defendant Bank, was directed by the Head Cashier to see Mukherjee at his office for the purpose of collecting the money from him and delivering over the shares. Sachindra Sen, an officer of the defendant under whose advice Paul was sent to Mukherjee, says in his deposition, that he definitely instructed Paul not to deliver the shares unless he received payment. As regards the mode of payment, Sen says that it was already arranged between him and Mukherjee that instead of paying the money in cash, he would give a pay order of the Punjab National Bank, where he had an account, upon the defendant bank. Sen told Paul to examine the pay order carefully and to part with the shares only if he was satisfied about it; otherwise, he should come back with the shares to the office. Paul, who is the principal witness on behalf of the defendant, says in his deposition that the instruction which he received was to deliver the shares after he obtained the pay order. Paul saw Mukherjee at his office chamber at about 11 A.M. on the 18th and on his telling Mukherjee that he had come from the United Industrial Bank to deliver over the shares, Mukherjee asked him to take his seat. Mukherjee then asked for the shares. Paul told him that he could not deliver the shares unless he was given the pay order. Mukherjee then said "I just want to have a look at the shares and the papers only to see whether they are all right or not." Upon this, Paul placed the shares on the table. What happened afterwards is thus narrated by him in his deposition:

"Then he was looking the shares one after another. When Mukherjee was about to leave the chamber, I told him not to go away but to give me the pay order. He told me 'I am going out, to get the pay order, it is ready, you take your seat, I am coming.' Then he went out of the chamber."

It is quite clear that when Paul placed the share certificates upon the table and allowed Mukherjee to scrutinise them, he did not part with the possession of or control over the shares.

It is true that Mukherjee handled the papers, but he did so in the presence of Paul who was sitting by his side in front of the same table. At the most, Mukherjee could be said to have the barest physical custody for the purpose of examining the papers. When Mukherjee went out of the room with the shares in his hand, he undoubtedly got possession of the shares; but on the evidence on the record, we do not think it possible to hold that he got possession with the consent of Paul. The evidence shows that Paul actually protested and objected to his going away with the shares without making any payment. It is true that Mukherjee told Paul that he was going out for getting the pay order, and would be coming back immediately; but we cannot agree with Mr. Mullick that Paul consented to Mukherjee's taking away the papers, relying on the latter's promise to come back with the pay order. Mukherjee gave Paul no opportunity whatsoever to express his assent or dissent in this matter. In spite of Paul's protest, he bolted away with the papers asking Paul to wait. Paul says in his deposition that he waited for 2 or 3 minutes, and when Mukherjee did not come back, he became anxious and went out of the chamber towards the counter where he found an old gentleman sitting. The gentleman told him that Mukherjee was nowhere in the office. This shows that Paul did not really rely upon the assurance of Mukherjee and did not allow Mukherjee to have possession of the shares upon that assurance. It was against his express desire that Mukherjee took the shares and left the chamber with them and he had to wait for a minute or two as he could not think of any other alternative open to him at that juncture. Taking the evidence as a whole, we think that the decision of the appellate bench of the High Court is correct and that on the facts and circumstances of this case, it cannot be held that Mukherjee got possession of the shares with the consent of Paul. The result, therefore, is that the appeal is dismissed and the judgment of the appeal court is affirmed. As both the plaintiff and the defendant were innocent persons, who suffered on account of the fraud of a third party, we direct that the parties shall bear their own costs in all the courts.

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Sukumar Ghosh, Agent for the Appellant.*B. N. Ghosh*, Agent for the Respondent.

S.G.P.

The appeal dismissed.

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Before Mr. Justice P. B. Mukharji.

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KARUNA KUMAR DATTA GUPTA & ORS.*

June, 7.

Costs—Taxation—Rule 23 of Chapter VI of the High Court Original Side Rules—Duty of the Taxation Officer under Rule 11 of Chapter XXXVI of the Original Side Rules—Review by the Judge under Rule 72 of the Chapter XXXVI of the Original Side Rules.

When a case is not "otherwise prescribed or ordered" the costs of a Chamber application* be costs in the suit or matter, under Rule 23 of Chapter VI of the Original Side Rules.

The duty of the Taxing Officer under Rule 11 of Chapter XXXVI of the Original Side Rules is first to make a general examination of the course of proceeding and then he has to come to a finding that any part of such proceeding has been injuriously or unnecessarily caused by culpable negligence or improper conduct of any Attorney. When he does come to that finding his duty is not to allow that charge which he considers unnecessary, but refer the same to the Court. The Taxing Officer cannot disallow costs in respect of such order without such reference to the Court.

The power of the Judge reviewing taxation and making any order in course of such review is very wide. Under Rule 72 of the Chapter XXXVI Original Side Rules the Judge may make "Such order as to him may seem just" while reviewing the taxation.

The material facts will appear from the judgment.

S. N. Bose for the Attorney Applicant.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This is a summons of the plaintiff's attorney for review of the decision of the Taxing Officer dated 28th April 1954.

* Re: Application in Original Suit No. 1732 of 1949.

The bill of costs of the plaintiff's attorney was lodged for taxation as between attorney and client under the warrant of attorney. No one on behalf of the plaintiff appeared before the Assistant Taxing Officer at the time of taxation although notice was served on the plaintiff. The Assistant Taxing Officer disallowed 15 items of that bill of costs which are incidental to the application of the plaintiff for discovery against the guardian-ad-litem of the seventh defendant in the suit who is a minor. The plaintiff's attorney filed his exceptions in respect of those items disallowed by the Assistant Taxing Officer and the said exceptions were heard and decided by the Taxing Officer on the 28th April 1954. No one on behalf of the plaintiff appeared at the time when such exceptions were heard in spite of the notice served on the plaintiff. By that order of the 28th April 1954 the Taxing Officer upheld the view of the Assistant Taxing Officer and discharged the exceptions with costs.

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In that order of the Taxing Officer it is stated after disallowing the exceptions:

"I feel tempted to report this matter to Court under rule 11 Chapter XXXVI of the Original Side Rules, as I consider that it was improper on the part of the attorney to make this application for discovery against the minor defendant No. 7 in the circumstances discussed before me but I do not do so as the charges for the same have already been disallowed by the Assistant Taxing Officer and which decision is being upheld by me."

In this application before me the only argument of the plaintiff's attorney is that there was an order of the Master dated the 8th March 1951. This order itself does not allow the costs expressly but it is argued that by reason of Rule 23 Chapter VI of the Original Side Rules the plaintiff should get the costs. It is therefore contended that the Taxing Officer was wrong and acted beyond his authority and jurisdiction in going behind that order of the Master and considering the necessity and propriety of that order.

It is necessary to discuss the reasons put forward by the Taxing Officer in his order complained against disallowing these costs. The reasons are;

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"The plaintiff could have made an application for discovery against defendant No. 7 without waiting for the guardian-ad-litem of the said minor defendant to file his voluntary statement. There is nothing on the Original Side Rules to prevent him from doing so. Assuming that his said contention was correct I find that on the 20th June 1950 Sri N. De, a Solicitor, was appointed the guardian-ad-litem of the minor defendant No. 7. The plaintiff could, therefore, have easily obtained an order for discovery against the minor defendant No. 7 when the latter had already got a guardian appointed for him. This the plaintiff did not do, although, it is on record, that on the 8th December 1950 the plaintiff made an application for discovery against defendants No. 1 to 6. If he had done so, he could have avoided the costs of the application for discovery made on the 8th March 1951. It is to be remembered that on the 14th December 1950 Sri N. De filed a voluntary statement on behalf of the minor defendant No. 7 in which he stated that he had no knowledge of the facts pleaded in the plaint of the suit in question and accordingly left the matter to the decision of the court. On the face of the above statement I am of the opinion that there was no occasion for the plaintiff to make an application for discovery against the minor defendant No. 7, on the 8th March 1951."

In meeting the further argument of the plaintiff's attorney before him that the costs of the application for discovery must in any event be allowed under rule 23 Chapter VI of the Original Side Rules where it is provided that in chamber applications "unless otherwise prescribed or ordered" the costs "shall be costs in the suit or matter," the Taxing Officer gave his further reasons in his order in these terms:

"It is not disputed that the costs of all the applications and proceedings in chambers shall be costs in the suit or matter unless otherwise prescribed or ordered. If the plaintiff had made six separate applications for discovery as against the six defendants in this suit and obtained orders for discovery as against them separately, could he have invoked the aid of rule 23 Chapter VI of the Original Side Rules in respect of his claim for costs of such appli-

cations? Certainly not. If the Court come to know that he had already made applications for discovery against defendants 1 to 6 and was making a fresh application for an order for discovery against minor defendant No. 7, the Court would have considered the application on its own merits and made necessary orders as to costs. The fact that the plaintiff had already obtained an order for discovery against defendants 1 to 6 was perhaps not disclosed in the application the plaintiff made against the minor defendant No. 7 on the 8th March 1951, and as such the Court was not in possession of the actual facts and therefore did not perhaps make any order as to costs in the said application."

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The Taxing Officer proceeded on the hypothesis of what the Court would have done and observed:

"If the plaintiff had in his application for discovery against the minor defendant No. 7 stated the correct facts and if the Court had the opportunity to read what was stated in the voluntary statement filed by the guardian-ad-litem, the Court would have rejected the plaintiff's application for discovery against the minor defendant No. 7 made on the 8th March 1951 under Order XI rule 12 of the Civil Procedure Code and perhaps with costs."

Finally the Taxing Officer comes to the conclusion:

"In the present case the minor defendant had no knowledge of the facts pleaded in the plaint and accordingly left the matter entirely to the discretion of the Court. There was, therefore, in my opinion, no necessity for obtaining an order for discovery against the said minor defendant and Assistant Taxing Officer, Sri H. K. Ganguli, correctly disallowed all charges relating to the application resulting in the order for discovery dated the 8th March, 1951."

With these observations the Taxing Officer discharged the exceptions and concluded his order with a reference to rule 11 Chapter XXXVI, Original Side Rules which I have quoted above.

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Now it appears to me that there is a very great confusion made both by the plaintiff's attorney as well as by the Taxing Officer.

The plaintiff's attorney is not right in his submission that the order of the 8th March 1951 gave the costs. In fact in that order no direction for costs was made. Neither the Master's summons for discovery asked for costs nor did the order for discovery made thereon expressed give any costs or make any reference as to costs. It was, therefore, necessary for the plaintiff's attorney to invoke rule 23 Chapter VI of the Original Side Rules with regard to his claim for such costs. As this was a case which was not "otherwise prescribed or ordered" the plaintiff's attorney naturally claimed that such costs should be costs in the suit. It was not so much, therefore, a case of the Taxing Officer sitting in judgment over an order of the Court allowing costs as going against the provisions of rule 23 Chapter VI, Original Side Rules.

The Taxing Officer as well as the Assistant Taxing Officer on the other hand were equally wrong in themselves disallowing costs without reference to the court on the ground that the application for discovery against the minor defendant was unnecessary when the Court had ordered discovery against such minor defendant. In so far as they did so they were sitting in judgment over the necessity or propriety of such an order which has already been made by the Court without bringing the matter to the notice of the court as required by Rule 11 of Chapter 36 of the Original Side Rules. The Taxing Officer is not entitled to proceed on the assumption that an order of the Court was made unnecessarily without reference to the court. The further error of the Taxing Officer was due to a misunderstanding of the provisions of rule 11 Chapter XXXVI, Original Side Rules. That rule is as follows:

"Upon the taxation of the costs which shall have been allowed by any decree or order, made in a suit, the Taxing Officer shall make a general examination of the course of the proceedings on which such costs shall have arisen, and where he shall find that any part of such proceedings, attended with costs, has been injuriously or unnecessarily

occasioned by the culpable negligence or improper conduct of any attorney, he shall not allow any charge for the same without the matter being brought to the notice of the Court, and for the better enabling the Taxing Officer to make such inquiry, the officers of the Court shall allow him, without fee, to examine the proceedings in the different offices. The Taxing Officer shall be at liberty to report to the Court any matter arising out of this rule, on which either himself, or any of the parties interested may desire that the decision of the Court shall be obtained."

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It will be plain from a reading of this rule that when the Taxing Officer on a general examination of the course of the proceedings finds that any part of such proceedings has been injuriously or unnecessarily occasioned by the culpable negligence or improper conduct of any attorney, he shall not allow any charge for the same without the matter being brought to the notice of the court. The duty of the Taxing Officer under this Rule is clear. He has first to make a general examination of the course of proceedings. Then he has to come to a finding that any part of such proceedings has been injuriously or unnecessarily caused by culpable negligence or improper conduct of any attorney. When he does come to that finding, his duty is not to allow that charge which he considers injurious or unnecessary but refer the same to the court. The reason for bringing the matter to the notice of the Court under this rule is obvious. It is because the Court has already made an order and therefore the court should be the ultimate authority to say after its notice has been drawn to all the facts and findings of the Taxing Officer whether the charge in respect of the order it passed should be allowed or not. Therefore the Taxing Officer cannot disallow the costs in respect of such order without such reference to the Court. If that were not the interpretation then the Taxing Officer would be in a position in every case to disallow costs in respect of orders made by Court without reference to the Court and then avoid such reference by saying as he does here, that no such reference is needed because the costs have been disallowed by him. That will make the situation impossible. The Rule expressly says he shall not allow such charge without bringing the matter to the notice of the court. In so far therefore as the Taxing Officer disallowed the

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costs in this case without reference to the court he was exceeding the powers under rule 11 Chapter XXXVI, Original Side Rules. The reason behind Rule 11 Chapter 36 Original Side Rules for investing the Taxing Officer with this power not to allow such costs even in the case where a decree or order has allowed such costs, is that he is in a better position by virtue of his "general examination of the course of proceedings" to discover whether a particular decree or order for costs refers to a part of the proceedings where costs have been injuriously or unnecessarily caused by the culpable negligence or improper conduct of the attorney, than the court or the authority making the decree or order because when that is made, a general examination of the course of proceedings is not made by the court or authority making the decree or order. But this is only a check in the hands of the Taxing Officer and is not a unqualified power. If he has to act on it, he can only do so by bringing it to the notice of the court. The difficulty now lies in the course which this court should follow in a case like this. Clearly, the Taxing Officer was wrong in disallowing the costs without reference to the court and his decision, therefore, must be set aside. I can after setting aside his order either tax the costs myself by allowing or disallowing such costs or I can direct the Taxing Officer to re-hear the Exceptions in the light of the principles laid down in this judgment so that there may be a fresh taxation. The power of the Judge reviewing taxation and making any order in course of such review is very wide. Under Rule 72 of Chapter 36, Original Side Rules, the Judge may make "such order as to him may seem just" while reviewing the taxation. To send this back to the Taxing Officer in such circumstances in this case will be only to encourage multiplicity of proceedings for a conclusion foregone, because the Taxing Officer has already expressed his view that he would have liked to make a report under Chapter 36, Rule 11, Original Side Rules, but that he did not make it on the ground that the costs were disallowed by the Assistant Taxing Officer and thereby misconceived that rule. If, therefore, I send this back to the Taxing Officer what he would do, and he has no other option having regard to the view he has already expressed, would be to make a report under Rule 11, Chapter 36, Original Side Rules, stating the very same grounds as he has done in his order. His reason in a report under Rule 11 of Chapter 36, Original Side

Rules, will be the same as in this order complained against, that this order of discovery against the minor defendant was in the facts and circumstances "unnecessarily occasioned by the culpable negligence or improper conduct of the attorney." I will, therefore, treat this order of the Taxing Officer dated the 28th April, 1954, as his report under Rule 11 of Chapter 36, Original Side Rules, after setting aside only that part of his order where he constituted himself the final authority to disallow the costs without reference to this Court. What the Taxing Officer could not do this court however can. It can do so not only under Rule 11 of Chapter 36, Original Side Rules, but also under Rule 72, Chapter 36, Original Side Rules, where the powers of the reviewing Judge are wide enough as already indicated. On the facts already stated I therefore disallow the costs of the plaintiff's attorney in respect of the 15 items of the Bill of costs which are incidental to the application of the plaintiff for discovery against the Guardian-ad-litem of the minor 7th defendant, as being entirely unnecessary and caused by the culpable negligence or improper conduct of the attorney.

The order, therefore, is as follows: I set aside the order of the Taxing Officer dated the 28th April, 1954 in so far as he himself finally disallowed those costs without reference to this Court but treat the rest of his order dated the 28th April, 1954 and the facts and reasons given therein as a report under Rule 11 of Chapter 36, Original Side Rules bringing such facts and reasons to the notice of this Court.

Also under Rule 72 of Chapter 36, Original Side Rules, empowering the Judge to make any order which to him seems just, I am of the opinion and I consider it just that these costs which the plaintiff's attorney has claimed, should be disallowed. I disallow these costs also under Rule 72 of Chapter 36 Original Side Rules.

I dismiss the application with the order I have indicated but I make no order as to costs of this application.

B. M. Bagaria: Solicitor for the Applicant.

S.K.R.C,

Application dismissed.

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APPELLATE CIVIL.

*Before Mr. Justice Renupada Mukherjee and
Mr. Justice R. P. Mookerjee.*

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KALIDAS GHOSH

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v.

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March, 24.

Contract—Time Limit for performance of contract—Whether time is an essence of contract is a question of intention of parties—Express stipulation, not a safe guide—Intention to be inferred from circumstances and facts of the case—Section 55 of the Indian Contract Act.

The mere mentioning of the fact that time should be deemed to be of essence of the contract does not make it voidable at the instance of one of the contracting parties. Under Section 55 of the Indian Contract Act, the contract become voidable after the lapse of the specified time if the intention of the parties was that time should be of the essence of contract. This intention should be ascertained not only from the written words of the contract but the nature of the property which is the subject matter of the contract, the nature of the contract itself and also from the surrounding circumstances.

In spite of express stipulation that time should be deemed the essence of the contract, it cannot be held to be so, if it appears to the Court that neither side was keen on the completion of the contract within the stipulated time and the time was a matter of secondary importance having no material connection with, or bearing on, the main terms of the contract.

Appeal by the Plaintiff.

Suit for specific performance of the contract for sale of land.

The material facts will appear from the judgment.

Jitendra Kumar Sen Gupta and Arabinda Guha for the Appellant.

Atul Chandra Gupta and Nani Coomer Chakravarty for the Respondent.

* F.A. 139 of 1948 against the decree of Sri H. C. Ghose, Additional Subordinate Judge 4th Court of Zillah 24-Parganas, in Title Suit No. 12 of 1948, dated 21st of April 1948.

The judgment of the Court was as follows:—

Renupada Mukherjee, J.:—This is an appeal by the plaintiff and is directed against a judgment and decree passed by the Additional Subordinate Judge, Fourth Court, 24-Parganas in Title Suit No. 12 of 1948/171 of 1946 of his Court.

The suit was instituted by the plaintiff for a declaration that a certain contract between himself and the respondent was subsisting at the date of the suit, and he was entitled to get a decree for specific performance of it by having a conveyance from the respondent. It will be seen later that although the suit was brought as a declaratory suit the substantial relief which could be given to the plaintiff in this case is a decree for specific performance of the alleged contract.

The suit was contested by the respondent and it was dismissed by the Trial Court on the ground that in this case time was of the essence of the contract, and the defendant was justified in avoiding the contract because of the failure of the plaintiff to perform his part of the contract within the time stipulated in it. The plaintiff has preferred this appeal against the above judgment and decree.

The points requiring decision in this appeal are:

(1) Was time of the essence of the contract in this particular case?

(2) Is the plaintiff appellant entitled to have the contract specifically enforced?

Both the above points are intermixed and they may be conveniently taken together for decision.

The undisputed facts of this case may thus be set out shortly. The respondent company started a scheme for development and sale of land for residential purposes known as Lake Colony Scheme No. 1 within Police Station Tollygunge. Even

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before the land was completely developed it was parcelled out into plots, and these plots were offered to the public for sale. Appellant Kalidas Ghose made an application to the company on the 15th April, 1943, proposing to purchase plot No. 186 of the scheme at a price of Rs. 1,800/- per cotta, and he also deposited Rs. 101/- with the company on the same day by way of earnest money. This application was marked exhibit 4 in the Trial Court. On the same day the Company granted a receipt to the appellant acknowledging receipt of the earnest money and calling upon him to have the conveyance completed within a month from that date on payment of the balance of the consideration money (Vide receipt, exhibit 5). Admittedly neither party did any thing towards the performance of the contract within the above period or even after the expiry of that period until on the 20th June, 1944, that is, fourteen months after the date of the agreement the appellant wrote a registered letter to the respondent enquiring when the roads and drains were going to be constructed and arrangement for water supply made and also when he should be called upon to pay the purchase price (Vide letter, exhibit 3). It is, however, admitted that the Government was in the meanwhile requisitioning the land covered by the scheme bit by bit for war purposes making it impossible for the Company to develop the land fully. The evidence of respondent's manager and sole witness Kanailal Muchhala on this point which is not challenged by the appellant would show that such requisition started from November, 1941, and ended in November, 1944, by which time the entire land covered by the scheme was requisitioned by the Government. The letter written by the appellant to the respondent and referred to above remained unanswered, and so also another registered letter to the same time bearing date, the 20th August 1945 [Vide exhibit 3(a)]. On the 22nd October, 1945 appellant's pleader Sri Harendra Nath Chatterjee wrote a letter to the respondent demanding the completion of the conveyance on behalf of his client. To this the respondent replied on the 24th January, to say that the contract stood cancelled and the earnest money was forfeited because the appellant had not completed the transaction within the period stipulated in the contract by payment of the balance of the consideration money (vide letter, exhibit C).

Upon the above facts which are not disputed the question arises whether time was of the essence of the contract in this particular case and whether the appellant can reasonably ask the Court for specific performance of the contract.

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Mr. Sen Gupta appearing on behalf of the appellant contended that the application made by his client on the 15th April, 1943, and the receipt given to him on the same date together constituted the contract between the parties, and the Lower Court was wrong in holding that the contract was embodied only in the receipt. The application (exhibit 4) no doubt shows that appellant undertook to complete the transaction within one month of the completion of the road and drains. This is, however, a proposal of the appellant which was not accepted by the company because in the receipt granted to the appellant by the company on the same day the above terms is conspicuous by its absence. It is expressly provided that the conveyance must be completed within one month from the 15th April, 1943 on payment of the balance of the consideration money. In my judgment, the Lower Court is justified in holding that the terms of the entire contract are embodied in the receipt marked exhibit 5. It is also my view that no reference can be made to the application of the appellant for the purpose of deducing the terms of the contract.

Mr. Sen Gupta next contended on behalf of the appellant that the respondent's manager gave a verbal assurance to his client that the conveyance would be executed upon completion of roads and drains. The manager denies that he ever gave such an assurance, and there being oath *versus* oath I hold that the case of the appellant that there was a modification of the original contract by the verbal assurance of the manager has not been made out. The rights of the parties must be governed by the contract as embodied in the receipt marked exhibit 5.

I now come to the real crux of the problem viz. whether time should be regarded to be of the essence of the contract contained in exhibit 5. The first paragraph of this document which recites the price of the land offered for sale and the receipt of the earnest money of Rs. 101/- by the company is not relevant for our purpose. The next two paragraphs which are very important for our purpose are quoted here:

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"The conveyance must be completed within one month from date on payment of the balance of the consideration money, time being deemed as the essence of the contract. In case of default this agreement will be considered as cancelled with forfeiture of earnest money.

"One third of the value of the land will be paid at the time of registration and the balance within 6 years bearing 6 per cent, interest per annum."

There is, therefore, an express stipulation in the contract that time should be deemed to be of the essence of the contract, and that if the contract was not performed within one month from the date of the receipt, the agreement would be considered as cancelled with forfeiture of the earnest money. The receipt was given in a printed form. The mere mentioning of the fact that time should be deemed to be of the essence of the contract does not make it voidable at the instance of one of the contracting parties. Under section 55 of the Indian Contract Act, the Contract become voidable after the lapse of the specified time if the intention of the parties was that time should be of the essence of the contract, vide in this connection the case reported in *Bhuda Chandia Goswami v. C. R. S. Betts* (1). This intention should be ascertained not only from the written words of the contract, but the nature of the property which is the subject matter of the contract, the nature of the contract itself and also from the surrounding circumstances. In the present case the learned Subordinate Judge was wholly and solely influenced by the express stipulations between the parties which were, according to him "absolutely clear and iron clad." He has cited the Privy Council case reported in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (2), in support of his conclusion. In my opinion, the learned Subordinate Judge has misappreciated the principles of law enunciated in that case. The following observations contained at page 747 of the report may be quoted in this connection:

"The law applicable to the point is contained in section 55 of the Indian Contract Act, 1872, which provides

(1) (1915) 22 C L J. 566.

(2) (1915) 20 C W N. 744

that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

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"Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time."

The present contract has not been examined by the learned Subordinate Judge in the light of the above observations. It is true that in paragraph 2 of the contract (exhibit 5) a time limit of one month was set for performance of his part of the contract by the appellant by payment of the balance of consideration money amounting to Rs. 14,400/- minus Rs. 101/- that is, Rs. 14,299/-. But in the very next paragraph it is stated that one-third of the value of the land would be paid at the time of registration and the balance within six years bearing interest at six per cent. per annum. So after all the whole consideration was not to be paid within a month from the 15th April, 1943, as was stipulated in the paragraph containing the time limit. Then again it was within the knowledge of both parties that a substantial portion of the land covered by the scheme had already come under requisition at the time of the contract, and it was not possible for the respondent company to develop the land fully by constructing roads and drains until the requisition was withdrawn. The appellant could not also possibly construct any building on the land soon after the contract. In these circumstances, it is patent that neither side was keen on the completion of the contract within the stipulated

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time, and the time limit was a matter of secondary importance having no material connection with, or bearing on the main terms of the contract.

The subsequent conduct of the parties would also throw some light on the original intention of the parties regarding the stipulated time of the agreement. The respondent is a company and not a private individual, yet it did not think it proper or necessary to give any notice to the appellant on the expiry of the time limit intimating that the contract was avoided or that it stood cancelled. What is more surprising is that although the appellant himself wrote two registered letters to the company, one on the 20th June, 1944 (exhibit 3) and another on the 26th August, 1945 (exhibit 3(a) enquiring what was the position with regard to his plot and when he might expect to be called upon to complete the conveyance, the respondent never replied to those letters and never took up the position that the contract had already come to an end.

Mr. Sen Gupta appearing on behalf of the appellant at one stage of his argument submitted that the silence of the company over these two letters amounted to a waiver of its right to rescind the contract. To this Mr. Gupta on behalf of the respondent rightly pointed out that there could be no waiver if the contract had already come to an end automatically by the force of its own terms. In my judgment the omission of the company to answer the above letters would not constitute a waiver on its part, but it is a significant piece of conduct which would tend to show that the company had never intended that the contract would automatically come to an end if it was not performed within a month from the 15th April, 1943. It was not until the 24th January, 1946, that the respondent intimated to the appellant by a letter (marked exhibit C) that the contract had stood cancelled on account of appellant's laches to perform his share of it. This letter was written in answer to appellant's letter, dated the 22nd October, 1945, demanding specific performance of the contract (exhibit 6.).

On a careful examination of the contract between the parties, the circumstances in which the property was placed at the time of the contract, and the subsequent conduct of the parties in relation to the contract, I am clearly of opinion that

time was never intended to be of the essence of the contract although such a clause was put in the contract, and so the appellant who has not violated any of the material terms of the contract is entitled both in law and in equity to get specific performance of it.

Now, from the prayer of the plaint it would be found that the relief asked for by the plaintiff mainly consists of two declarations, viz. that the contract was still subsisting and that the plaintiff was entitled to get a conveyance executed and registered in his favour by the defendant company on payment of the stipulated price. There is also a general prayer to the effect that the plaintiff might be given such further or other reliefs as the Court might think proper. I think that mere granting of the two declarations mentioned in the plaint would not give any substantial relief to the plaintiff, and neither would it completely set at rest the real controversy between the parties. Even if the declarations asked for be granted that would have no binding effect upon the respondent to execute and register any conveyance in favour of the appellant. In order that complete and final justice may be done between the parties. I am of opinion that the appellant should be given a decree for specific performance of the contract as well, and I think that the Court is empowered to grant such a relief in the circumstances of the case in pursuance of the general prayer made by the appellant for such further and other reliefs as to the Court may seem fit and proper. The only difficulty which stands in the way of granting such a relief is that neither the plaint in the Trial Court nor the memorandum of appeal presented in this Court was stamped with *ad valorem* Court fees which would be necessary if the relief mentioned above was to be granted.

Mr. Sen Gupta appearing on behalf of the appellant informs us that his client is prepared to pay *ad valorem* Court Fees both for the plaint in the Trial Court and the memorandum of appeal in this Court. In these circumstances time is allowed till the 15th April, 1954, for payment of requisite *ad valorem* Court fees for the plaint and the memorandum of appeal less Court fees already paid upon them. Final orders in the appeal will be passed on that date.

R. P. Mookerjee, J.:—I agree.

S.G.P.

Appeal allowed.

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June, 15.

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RAM KINKAR KUNDU.*

Civil Procedure Code—Order 41, Rule 27(1) (b)—Appeal—Additional evidence at appellate stage, justification of—Evidence already on record to be substantially examined first by the appeal court—Additional evidence admissible only if the evidence on record is found insufficient for the appeal Court to come to a conclusion.

The appeal Court has got to examine fully and substantially the evidence already on record before admitting additional evidence. The question of additional evidence is to be considered from the point of view of the Court's requirement "to enable it to pronounce judgment or for any other substantial cause," for which no valid occasion can legitimately arise before a full or, at least, substantial and sufficient examination of the evidence, already on record.

The "requirement" of the Court under Order 41 Rule 27(1) (b) of the Civil Procedure Code must have to be judged on the "evidence on record" before reception of additional evidence and must be found to arise upon and only after the Court's appreciation of that evidence on record.

Appeal by the Defendants.

Suit under Section 77 of the Indian Registration Act.

The material facts will appear from the judgment.

Jitendra Nath Guha, Amal Kumar Mukherjee and Nikhil Chandra Talukdar for the Appellants.

Lala Hementa Kumar for the Respondents.

* Appeal from Appellate Decree No 838 of 1949, against the Decree of Sri N. M. Sarkar, Additional Sub-Judge, Zillah Hooghly at Chinsurah dated 30th of July, 1949 in Title Appeal No. 127 of 1947 reversing the decree of Sri Tara Prasanna Mukherjee, Munsif 1st Court, Chinsurah dated the 31st of May, 1947.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—This is the defendant's appeal arising out of a suit under section 77 of the Indian Registration Act. The disputed document is a kobala, bearing date the 1st March, 1945. The defendants denied execution of this kobala. On their refusal to register it, it was presented for registration by the plaintiff on 13th March, 1945. Registration was refused by the authorities under the Registration Act and, thereafter, on 3rd January, 1946, the present suit was brought by the plaintiff under section 77 of that Act. The trial court came to the conclusion that the execution of the disputed document by the defendants had not been satisfactorily proved and, in that view of the matter, he dismissed the plaintiffs suit. On appeal, that decision has been reversed by the learned Subordinate Judge whose judgment is based mainly upon the additional evidence of a lawyer-witness Babu Kishorilal Das, who was examined by the Court and whose evidence was admitted at the appellate stage. The defendants have now come up to this court in Second Appeal.

The only point which has been urged by Mr. Guha in support of this appeal is that the reception of the additional evidence by the learned Subordinate Judge at the appellate stage was improper and not justified by the terms of the relevant provision of the code, namely, Order 41 Rule 27(1) (b). In my opinion Guha's submission is not without force in the circumstances of the present case.

The additional evidence in question was received and admitted by the learned Subordinate Judge in the Course of the hearing of the appeal by his order No. 30 dated the 18th July, 1949, and the reasons, given by him for admission of that evidence, appear in that order in the following terms:

"It appears to me that the evidence of Sri Kishorilal Das Pleader, is necessary for the ends of justice as it transpires from the evidence of the scribe (P.W. 5) that Kishor Babu prepared that draft of the Kobala in question. I therefore order examination of Sri Kishorilal Das, to be examined as a witness before me under Order 41, Rule 27 of the Code of Civil Procedure."

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The defendants objected to the reception of this additional evidence but their objection was overruled by the learned Subordinate Judge by his order No. 31 dated 19th July, 1949, with *inter alia* the following observations:

"The necessity for examining Sri Kishorilal Das arose from the evidence, adduced in the suit, and further, the learned Pleader for the respondent repeatedly harped on the absence of Kishori Babu from the dock. My order dated 18th July, 1949, thus stands."

In the final judgment delivered by the learned Subordinate Judge, he made the following observations on this aspect of the matter:

"Babu Kishorilal Das was not examined in the lower Court. But at the time of hearing of the appeal when the learned pleader for the respondent repeatedly referred to the absence of Kishori Babu from the dock, I thought it advisable for the ends of justice to examine Babu Kishori Lal Das, Pleader, before me. The defendants thereafter made opposition to his examination but, none the less, I examined Kishori Babu who was allowed to be cross examined by both sides."

It seems to me that, in the circumstances of this case, as they appear from the present record, the evidence of Kishori Babu was improperly admitted at the appellate stage and I am not convinced that, in the context of those circumstances, the reasons given by the learned Subordinate Judge for taking that additional evidence, were proper or sufficient reasons within the meaning of the relevant Order 41, Rule 27(1) (b) of the Code of Civil Procedure. The test of requirement of the Court for pronouncing judgment or "for any other substantial cause" as laid down in that Rule and explained repeatedly in the several decisions of the Judicial Committee in *Kessowji Issur v. Great Indian Peninsula Railway Company* (1), *Parsotim Thakur and ors. v. Lal Mohar Thakur and ors.* (2), *Chaturbhuj Singh and ors. v. Gobinda Prasad Singh* (3), *Sir Mohammad Akbar*

(1) (1907) 34 I.A. 115.

(2) (1931) 58 I.A. 254

(3) (1945) 50 C.W.N. 2.

Khan v. Musammat Moti and ors. (1), and also by the Supreme Court in their latest Pronouncement in the case of *Arjan Singh alis Puran v. Kartar Singh and ors.* (2), does not appear to have been borne in mind by the learned Subordinate Judge when admitting this additional evidence. The learned Subordinate Judge apparently thought, on the arguments before him, that Sri Kishori Lal Das was an important witness and he at once decided to examine him for "end of justice" and, what appeared no less important to him, to silence the defendants' lawyer's repeated adverse comments on "the absence of Kishori Babu from the dock." I am not satisfied that the learned Judge examined fully or even substantially the evidence on the record before embarking upon the some what perilous course of taking additional evidence at the Appellate stage and it seems almost clear that he did not consider the question of additional evidence from the point of view of the Court's requirement "to enable it to pronounce judgment or for any other substantial cause," for which requirement no valid occasion can legitimately arise before a full or, at least, substantial and sufficient examination of the evidence, already on record. The learned Subordinate Judge appears to have been unduly and prematurely swayed by the elliptical and elusive phrase "ends of justice" and, in no mean measure, also, by the defendants' lawyers adverse comments on the non-examination of Kishori Babu by the plaintiff which had little relevance under Order 41, Rule 27, of the Code. The learned Judge's approach, therefore, to the question before him cannot be justified in law and, on the present materials, the evidence of Sri Kishori Lal Das must be held to have been improperly admitted.

In the above circumstances, it is not possible for me to uphold the judgment of the learned Subordinate Judge, based mainly upon the additional evidence, so improperly admitted, namely, the evidence of the lawyer witness Sri Kishori Lal Das, taken at the Appellate stage, and that judgment, therefore, be set aside.

Mr. Lala, appearing for the respondent, relied strongly upon the other Supreme Court decision on this question of additional evidence, namely, the case of *Raja Kamala Ranjan Roy v. Baijnath Bajoria* (3). But, in my view, the present case falls

(1) (1947) 52 C.W.N. 132.

(2) (1951) S.C.R. (C.W.N.) 194 (S.C.); A.I.R. (S.C.), 193.

(3) (1951) A.I.R. (S.C.) 1; (1948) 53 C.W.N. 329.

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clearly within the later pronouncement of the Supreme Court in *Arjan Sinha's case* (1), and its earlier decision, cited by Mr. Lala is distinguishable.

In the decision, cited by Mr. Lala in *Raja Kamala Ranjan's case* (2), their Lordships of the Supreme Court while dealing with the question of additional evidence and holding that "the matter" before them was "fully covered by Order 41, Rule 27, Civil P.C." observed at P. 4 of the Report as follows:

"The judgment of the Appeal court clearly indicates that it was the Appeal Court that 'required' the evidence 'in order to clear up the matter and' 'for the purpose of enabling it to come to a proper decision on this point.'"

Reading the above passage in the light of the earlier observations, made by their Lordships in the course of statement of facts at p. 2 of the Report, and the judgment of this Court in *Raja Kamala Ranjan Roy v. Baijnath Bajoria* (2), which was under appeal before them, it seems proper to hold, that their Lordships of the Supreme Court were satisfied that the "Appeal Court" was unable to come to a conclusion on the evidence, already on record,—which obviously implied that it had already sufficiently examined that evidence. When it decided to give the plaintiff "an opportunity to examine the Maharaja as a witness" in the case "so that all relevant facts might be brought out and placed before the Court for the purpose of enabling it to come to a proper decision." On the point, and admit the said additional evidence. The stage was thus properly set for reception of additional evidence and the theory of the Court's requirement as envisaged in Order 41, Rule 27 (1) (b) of the Code had obvious application. That this was the correct position receives confirmation from the discussion in the appeal Court's judgment in *Raja Kamala Ranjan Roy's case* (2). I do not, therefore, read this decision of the Supreme Court as lying down anything contrary to the other decisions, cited above, or as being of much assistance to Mr. Lala's client in the present case. On the findings, already made by me, the instant case now before me it clearly different and *Kamala Ranjan's case* (3), cannot aid the Respondent.

(1) (1951) S C R 194 (S.C.), (1951) A.I.R. (S.C.) 193.

(2) (1951) A I R (S.C.) 1, (1948) 53 C.W.N. 329 pp 334-5

(3) (1948) 53 C.W.N. 329 pp 334-5.

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I am not unmindful that, in *Ajan Singh's case* (1), and the Privy Council cases, cited above, the question arose on the application by a party to tender additional evidence but, in my view, that fact does not, in any way, affect or detract from the authority of those decisions or the generality and comprehensive character of this Lordships pronouncement and this very elaborate observation on the subject:—in matters of additional evidence under Order 41, Rule 27(1) (b) of the Code. Whether and how far those decisions will apply and *Parsotim's case* (2), so far as it seeks to explain away *Indrajit Sahi's case* (3), may have to be particularly and carefully considered on this aspect of the matter where additional evidence is sought to be introduced on the ground that the particular party had no opportunity to adduce such evidence earlier or how those decisions are to be interpreted in relation to such cases is not a question which arises for consideration on the present occasion, as there is no allegation here, up till now, that the Plaintiff-Respondent suffered from any such lack of opportunity. That being so, the "requirement" of the Court under Order 41, Rule 27(1) (b) of the Code must have to be judged on the "evidence on record" before reception of the impugned "additional evidence" and must be found to arise upon and only after the Court's appreciation of that "evidence on record." That presupposes examination of that evidence which tests was not followed in the present case. I am, accordingly, unable to accept the submission of Mr. Lala that the evidence of the lawyer witness Sri Kishori Lal Das was properly admitted at the appellate stage.

It thus follows that there has been no proper hearing before the Lower Appellate Court and its present decision cannot stand. It seems to me further that, in the circumstances of this case, it is only proper that the matter should go back to that court for a fresh hearing of the plaintiff's appeal before it in accordance with law. I direct accordingly.

I must make it clear, however, that, if the appellate court, on examining the evidence, already on the record, excluding, of course, the evidence of Sri Kishori Lal Das (which, as I have

(1) (1951) A.I.R. (S.C.) 193.

(2) (1931) 58 I.A. 254.

(3) (1923) 50 I.A. 183.

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already held, was improperly admitted and which, therefore, is no legal evidence and must altogether be left out of consideration), requires further evidence to be adduced in the light of the decision, to which reference has been made above, including the decision in *Kamala Ranjan's case* (1), as explained, in this judgment it will be open it to take such additional evidence at the appellate stage in accordance with law and nothing herein will in any way fetter its power in that respect.

I must point out also that, if the appellate court chooses to admit additional evidence, it will bear in mind the observations of the Judicial Committee in that connection in *Jagran Koer and ors. v. Kuar, Durga Prasad* (2), and, to the extent those observations will be found relevant in the present case, it will give them due weight and consideration and mould its action accordingly.

The appellate court will first consider properly the legal evidence, already on record, and then the question of its requirement, if any, under Order 41, Rule 27(1) (b) of the Code will arise. I am particularly emphasising this, lest there be repetition of the unfortunate error which was committed by the Lower Appellate Court on the present occasion and which has necessitated this remand.

In the above view of the matter, I allow this appeal, set aside the judgment and the decree of the learned Subordinate Judge and send the case back to the lower appellate Court to be dealt with in accordance with law in the light of the observations I have made above.

Costs of this appeal will abide the final result.

S.G.P.

Appeal allowed.

(1) (1951) A.I.R. (S.C.) 1.

(2) (1913) 41 I.A. 76-82.

APPELLATE CIVIL.

*Before Mr. Justice K. C. Das Gupta and
Mr. Justice Debabrata Mookherjee.*

MOHINI MOHAN BHATTACHARJEE & ORS.

v.

SOUTHERN BANK LTD.*

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January, 27.

Mortgage by deposit of title deeds by a Pardanashin woman—That must be proved in a suit for enforcement of such mortgage:

There can be no doubt that the cloak of protection which court puts round Pardanashin women is available to them not only in the cases of documents executed by them but also in the cases of transactions like creating a mortgage by depositing title deeds. It is necessary in such a case also for the plaintiff to show clearly that in making over the deeds the pardanashin illiterate woman understood fully the nature of her act and legal consequences thereof. Without clear proof on this it is not possible for the court to say that the deposit supposing that it has been proved to have been made by the woman here was made with the intention of creating a security.

The omission to record a proper certificate that the documents were read out and explained to the woman cannot be lightly treated in considering whether or not the documents were as a matter of fact read out and explained to her.

Suit for Enforcement of a Mortgage by Deposit of Title Deeds.

The defendants were the appellants.

The material facts will appear from the judgment.

Nishi Kanta Poddar and Ganga N. Chandra for the Appellants.

Apurbadhan Mukherji and Kamjit Mookherjee for the Respondent.

*Appeal from Original Decree No. 140 of 1949 against the decree of Sri Gouri Sankar Chatterjee, Subordinate Judge, 5th Court of Zillah 24 Parganas at Alipore, in Title Suit No. 81 of 1946 dated the 30th of September, 1948.

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The Judgment of the Court was as follows:—

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K. C. Das Gupta, J.—The appellants are the defendants in a suit for enforcement of a mortgage said to have been effected by deposit of title deeds by the appellants' predecessor in interest, mother Bhabani Bala Debi. The respondent's case is that on the 6th of September, 1940, Bhabani Bala's husband Kali Pada Bhattacharjee borrowed a sum of Rs. 5,000/- (five thousand rupees) on a promissory note from the respondent Bank and Bhabani Bala stood surety for this loan and deposited title deeds with the intention of creating security thereupon. It is further said that immediately after the deposit of the deeds she signed a letter by way of a memorandum evidencing the fact of deposit of the title deeds, and another letter, a letter of guarantee, by which she guaranteed repayment of not only the sum of Rs. 5,000/- advanced on the promissory note but other monies.

Bhabani Bala died within a few months after the alleged deed of deposit.

In the trial court the defendants denied, first, the fact of any receipt of money at all by Kali Pada and next the fact of deposit of any title deeds by Bhabani Bala or the execution of any Memorandum by her. They averred that she was a parda-nashin woman and never went to the Bank for this purpose and that the title deeds may have come into the possession of the Bank through Kali Pada.

The learned Court below held that a mortgage by depositing title deeds was effected by Bhabani Bala for a debt of Rs. 5,000/- only and ordered that the suit be decreed in the preliminary form for the sum of Rs. 5,000/-.

It has not been seriously contended before us that no loan was in fact taken by Kali Pada Bhattacharjee. It is also clear that the title deeds of the property which stood in the name of Bhabani Bala and by some means came into the possession of the Southern Bank. In order to satisfy the court that a mortgage by deposit of title deeds was effected by Bhabani Bala, it is necessary for the plaintiff to prove, firstly, that the deeds were,

in fact, deposited by Bhabani Bala and, secondly, that this deposit was with the intention of creating a security thereupon for her liability as surety for Kali Pada's loan. Two witnesses have been examined on behalf of the plaintiff to prove either of these facts; of them, one is the Manager of the Bank and the other is Amar Nath Roy Choudhury, an Advocate of the High Court of Calcutta. Strong reliance is also placed on the written documents, Exts. 5 and 6 which mention the deposit of the Title Deeds and which, according to the plaintiff, were signed by Bhabani Bala. Though the defendants have averred that Bhabani Bala could not write at all, I think it very unlikely that the writing that appears on these documents as the signature of Bhabani Bala has been forged. The writing is apparently of a person who has very little command over calligraphy. It does not seem to be probable that if any attempt was being made to forge the writing, this kind of writing would be resorted to. On a consideration of the probabilities I believe that Exts. 5 and 6 do bear the signature of Bhabani Bala.

The learned Advocate for the appellants lays much stress on the allegation that Bhabani Bala is a pardanashin illiterate woman. That she was a pardanashin illiterate woman was averred in the written statement. Strangely enough no issue was framed on this question. Evidence was however adduced on this point and we have the testimony of Bhawani's husband's brother that she was in fact a pardanashin woman. This was sought to be challenged in cross examination by a question that she occasionally goes to Cinemas. The witness admits that Bhawani Bala "used to go out with her husband for visiting cinema." In my judgment, this is no reason to disbelieve the truth of the statement that she was a pardanashin woman. I believe also from the evidence that though she knew to sign her name, she was practically illiterate. The learned Court below appears to have proceeded on the basis that she was in fact a pardanashin woman, but on a consideration of the evidence it came to the conclusion that "she perfectly understood the nature of the transaction and that the documents were explained to her properly."

The question remains whether the plaintiff has discharged the onus that lay on him to prove that Bhawani Bala fully under-

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stood the nature of the transaction before depositing the title deeds. The law on this question was laid down by the Privy Council in the case of *Farid-un-nisa v. Mukhtar Ahmed* (1), in these words:

"The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantages, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependant upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a *wakfnama* is a mere accident, and the general and well-settled law of *wakf* is not in question. The case of an illiterate pardanashin lady, denuding herself of a large proportion of her property without professional or independent advice is one on which there is much authority. Independent legal advice is not in itself essential: *Kali Baksh Singh's case* (2). After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it."

There can be no doubt that the cloak of protection which the court puts round Pardanashin women is available to them not only in the cases of documents executed by them but also in the cases of transactions like creating a mortgage by depositing title deeds. It is necessary in such a case also for the plaintiff to show clearly that in making over the deeds the pardanashin illiterate woman understood fully the nature of her act and legal consequences thereof. Without clear proof on this it is not possible for the court to say that the deposit supposing that

(1) (1925) L.R. 52 I.A. 342.

(2) (1918) L.R. 41 I.A. 29.

it has been proved to have been made by the woman here was made with the intention of creating a security thereupon.

Bearing these considerations in mind, let us now turn to the evidence in this case. As already stated, the evidence on the matter is given by two persons only, the Manager of the Bank and Amar Nath Roy Choudhury, an Advocate of the Court. Though the Manager stated in examination in chief that he as well as Amar Babu explained the documents to the woman, in cross examination he has admitted that he only stood by while Amar Babu was explaining and that it was Amar Babu alone who explained the matter to her. Amar Babu has no doubt said that he read over and explained the memorandum of deposit, Ext. 5, the letter of guarantee, Ext. 6, and explained to her that she was mortgaging her property as security for her husband's liability with the Bank. The question at once arises why, if Amar Babu read and explained these matters to her, he did not take the precaution of making a note on the documents themselves that these had been read and explained to her. Though the learned Subordinate Judge appears to have noticed that the "usual certificate was omitted from the documents" he does not appear to have asked himself the reasons therefor. It has been suggested to us on behalf of the respondent that as Amar Babu was at that time acting on behalf of the Bank he thought it unnecessary and indeed improper to note on the documents that they had been explained to her. I am not at all impressed by this argument. It seems to me clear that if the authorities of Bank were conscious at the time of the need in law to explain clearly the nature of the documents to the women, steps would have been taken not only to have the documents read out and explained to her but also to have a proper certificate recorded thereupon. If, on the other hand, they were not conscious of the need of such explanation, they would not take the trouble of having the documents read out and explained. In my judgment, the omission to record the certificate that the documents were read out and explained cannot be lightly treated. It has to be remembered that Kali Pada Bhattacharjee was an old customer of the Bank. It is not at all unlikely that the Bank would treat his word that the documents were being deposited by his wife with proper understanding as sufficient and would not take the trouble of taking

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any action to read and explain the documents to her or to explain the nature of the transaction itself. It would be noticed that in reply to a question by the court Amar Babu said that Bhawani Bala spoke to him and put questions to him in course of his explaining the terms to her and then again in further cross examination he made these statements, "I do not remember whether she put any specific questions to me, or whether Kali Pada Babu put any questions to me or whether she put any question to her husband and *vice versa*." On a consideration of all the circumstances it appears to me very unlikely that Amar Babu read and explained either the two documents, Exts. 5 and 6, or that he explained the nature of the transaction to her. I am conscious of the fact that the learned Subordinate Judge has believed the testimony of this witness, and for that reason I would not lightly interfere with that assessment. A consideration of the probabilities, however, make it clear to me that the learned Subordinate Judge is wrong in thinking that Amar Babu is telling the truth.

Even if it were assumed for a moment that Amar Babu is not lying in saying that he read out the document and explained it to her, I am of opinion that there can be no doubt that the explanation, if any, was very perfunctory. It is not at all likely that Bhawani Bala would be putting questions to him in this matter in the presence of her husband. If there were questions to be asked, it seems to me reasonable to believe that Bhawani Bala would ask her husband to explain the matter. My conclusion is that Amar Babu's evidence that he explained the documents or the transactions to Bhawani Bala should not be believed and that even if it is believed the explanation must be held to have been perfunctory and insufficient.

Assuming for the moment that Bhawani Bala did come to the Bank and deposit the title deeds herself, I am of opinion that the plaintiff has failed to prove that she did this with an intelligent understanding of the nature of that act, and that it has not been proved that she did so with the intention of creating a security thereupon.

For myself I have grave doubts about the truth of the story that Bhawani Bala came to the Bank and deposited the title

deeds. It seems to me more than likely that Kalipada took the title deeds from her—very probably not without her knowledge asked her to put her signature on the documents which are now exhs. 5 and 6 and himself handed over the title deeds as well as the signed letters to the Bank. As I have already stated, however, even if it be assumed that the deeds were deposited by Bhawanibala herself to the Bank, it has not been proved that she did so with the intention of creating a security thereupon. Accordingly, the plaintiff's suit must fail.

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I would therefore allow this appeal. The judgment and decree passed by the court below are set aside and the plaintiff's suit is dismissed. The appellants will get their costs in both the courts.

The cross objection was not pressed and it is therefore dismissed. There will however be no order for costs in the Cross objection.

Debabrata Mookherjee, J.:—I agree.

S.K.H.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice K. C. Chunder.

CRIMINAL.

PANCHU GOPAL GHOSE

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v.
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May, 27.

Code of Criminal Procedure, Section 250(2) whether the expression "the magistrate" includes his successor.

When the matter previously came up to High Court it was remanded, directing the court below to allow complainant to show cause and to consider the cause shown. In view of the fact that the trying magistrate had expressed his opinion, the case was sent back to another magistrate considered the fresh cause shown and passed an order for compensation. It was contended on behalf of the petitioner that the transferee magistrate should have sent the matter with his opinion to the previous magistrate for recording the final order. It was held that that was not necessary since the expression the magistrate includes his successor to whom the case has been transferred.

Application for Revision against an Order passed under Section 250, Criminal Procedure Code.

The material facts will appear from the judgment.

Charu Chandra Ganguly and Hemesh Chandra Sen for the Petitioner.

Bankim Chandra Roy (II) for the Opposite Party.

The judgment of the Court was as follows:—

K. C. Chunder, J.—This Rule was issued at the instance of the Complainant who was directed to pay compensation under Section 250 of the Code of Criminal Procedure.

It appears that this matter came up once before to this Court and it was remanded with a direction to the Court below to allow the complainant to show cause and directing the court to consider any cause thus shown. In view of the fact that the

* Criminal Revision Case No. 138 of 1954.

trying Magistrate had expressed his opinion, the case was sent back from this Court to another Magistrate. The other Magistrate considered the fresh cause shown as directed and passed an order for compensation.

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Mr. Ganguly's contention is that as clause (2) of Section 250 speaks of "the Magistrate" what should have been done was that the transferee Magistrate should have gone with the matter and then with his opinion sent it to the previous Magistrate for recording the final order. This is not necessary under the section. The Magistrate will include his successor to whom the case has been transferred. I therefore the Rule is discharged.

Rule discharged.

CIVIL REVISION.

Before Mr. Justice K. C. Chunder.

KALIDAS MUKHERJEE & ORS.

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1954.

BALAI CHAND GANGULY & ORS.*

June, 17.

West Bengal Premises Rent Control Act, 1950. Section 9.—What Rent Controller allow for increase in municipal tax.

When landlord applies under Section 9 of West Bengal Premises Rent Control Act, 1950, on the ground of increase in Municipal Taxes, the Rent Controller can allow increase only of the share of occupier's tax payable by tenant. He cannot allow the whole increase including owner's share because the Section itself says that he cannot allow any sum "over and above what is payable by landlord himself under the local municipal law."

Rule against an order upon an Application by Landlord under Section 9 of West Bengal Premises Rent Control Act, 1950.

* Civil Revision Case No. 1125 of 1953 against an Order of S. K. Roy, Judge, Small Causes Court, Calcutta, Sixth Bench, dated the 13th of December, 1953.

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The material facts will appear from the judgment.

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Hemendra Chandra Sen and Sachindra Chandra Das Gupta

Kalidas

for the Petitioner.

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Janendra Kumar Datta for the Opposite Party,

Balai Chand

Ganguly & ors.

K. C. Chunder, J.

The judgment of the Court was as follows:—

June, 17.

K. C. Chunder, J.:—This rule was issued at the instance of a landlord in connection with his application under Section 9 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, for an increase in the municipal taxes. The Court has given him an increase of the share of occupier's tax payable by the tenant. He now claims in this court that he should have been granted, because of a previous Contract, the whole increase, namely, including the owner's share, but the Section itself says "over and above what is payable by the landlord himself under the local municipal law." The owner's share is payable by the owner and not by the occupier. There is nothing of course in the local municipal law against a contract which may shift such payment of occupier's share on to the tenant. But we are not concerned with that question here. We are only concerned with the question what the Rent Controller may allow under the Rent Control Act and he can only allow such portion of the increased tax as is "over and above what will be payable by the landlord under the municipal law" and that is exactly what has been done in the present case. Therefore, there can be no interference in this case with that order.

The Rule is accordingly discharged with costs.

P.K.D.

Rule discharged.

APPELLATE CIVIL.

*Before Mr. P. B. Chakravartti, Chief Justice, and
Mr. Justice B. K. Guha.*

MANAGING AGENTS MESSRS. UKHARA FARMING
CORPORATION LIMITED.

v.

SATU-BALA BAGDINI.

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May, 20.

*Workmen's Compensation Act—Section 2(1) (n)—“Workmen,” definition of
Under Clause (ii) of Schedule II—A person employed elsewhere than
the premises where manufacturing process is carried on, not a “Work-
man.”*

Where a person employed in cutting *sabai* grass died of snake bite and
his mother claimed compensation under the Workmen's Compensation Act.

Held: The Clause 2(ii) of Schedule II of the Workmen's Compensa-
tion Act contemplated persons employed in the premises where manu-
facturing process is carried on. It does not cover persons who may be
connected with a concern which carries on a manufacturing process but who,
as far as they themselves are concerned, are employed in out door work.

Appeal by the Employer Company.

Application for Compensation under the Workmen's Com-
pensation Act.

The material facts will appear from this judgment.

*Priti-Bhusan Burman, Ranajit Ghosh and Manan Kumar
Ghosh for the Appellant.*

*Mukundu Behari Mullick, Mohendra Kumar Ghosh and
Rabindra Nath Mitra for the Respondents.*

The judgment of the Court was as follows:

• Appeal from Original Order No. 119 of 1953, against the order of
Shri N. L. Some, Commissioner for Workmen's Compensation, West Bengal,
dated 17th of January, 1953, in claim case No. 693 of 1952.

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Messrs. Ukhara
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v.
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Bagdini.

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P. B. Chakravartti, C.J.:—This appeal must be allowed on a point which does not appear to have been fully appreciated or properly canvassed before the learned Commissioner.

The appeal arises out of an application by one Satu Bala Bagdini, who claimed compensation to the amount of Rs. 1,000/- from the appellant company on the ground that her son, Khandu Bagdi, who had been a workman employed under the appellant, had been bitten by a venomous snake while so employed and had died as a result of the bite. The employment of the deceased was said to be the cutting of *sabai* grass for the purposes of a business carried on by the appellant company. The defence, which unfortunately appears to have been disfigured by many false pleas was, so far as the really material points are concerned, that the deceased had not been employed under the appellant at all, but was employed under a contractor, secondly, that his employment was of a casual nature, and, thirdly, that he could not be said to have been a workman within the definition in the Act.

At the trial, a further point appears to have been raised which was that the business of the appellant company was agricultural and, consequently, no body who had been employed as a worker in that business could claim to be a workman, as contemplated by the Act.

The Commissioner found that the deceased had been employed under the appellant and also that his employment was not of a casual nature. As regards the defence that the operations of the appellant company were of an agricultural character the Commissioner found that no such plea had been taken in the written statement and therefore, strictly speaking, it was not open to the appellant to take that plea. He, however, added that the undertaking of the appellant company was not limited to agriculture, but comprised manufacturing processes as well. The Commissioner found further that the field where the deceased had suffered the bite was one which was densely grown with *sabai* grass and a favourite abode of snakes. He, therefore, concluded that inasmuch as the employment of the deceased was to cut grass from the *sabai* field and inasmuch as the *sabai* field became thickly grassy during reaping time and also a

favourite haunt of snakes, the employment of the deceased was such as exposed him to the special risk of snake-bites, and consequently the bite which he received was an accident arising out of and in the course of his employment. On those various findings, the Commissioner decreed the claim for Rs. 900/-. The employer thereafter appealed.

An interesting discussion took place before us as to whether a fatal injury by snake bite, caused to a grass-cutter could at all be an accident arising out of and in the course of his employment. If this point had to be decided, the matter would have to be examined carefully and the true nature of the causation, which makes an accident occurring to a workman an accident arising "out of" his employment would have to be investigated and ascertained. It appears, however, that the decision of the point is not called for in the present case, inasmuch as the appellant must succeed and the respondent must fail for a very simple reason. I agree with the Commissioner that the appellant could not be allowed to raise the plea that the operations in which it was engaged were agricultural operations and therefore workers employed in them could not be workmen within the meaning of the Act. Such a plea obviously raises issues of fact, which the appellant could not be allowed to raise for the first time in appeal. I also agree with the Commissioner that the employment of the deceased was not of a casual nature. Even so, however, it appears to me that on the case made by the applicant herself and taking the description given by her of her son's occupation, as entirely correct, it must still be held that he was not a workman within the meaning of the Act. In order to show that such is the position, it is only necessary to refer to the material part of the definition of "workman" which occurs in section 2(1), (n) of the Act. Under that definition, "workman" means "any person * * * (ii) employed on monthly wages not exceeding four hundred rupees, in any such capacity as is specified in Schedule II." It is to be noticed that the language of the definition is not that the term "workman" includes certain classes of persons, but that it means them. In other words, the definition is exhaustive. If so, order that a person may claim to be a workman within the meaning of the Act, he must, if he is not a railway servant, and, therefore does

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not come under clause (i) of the definition section, prove that he comes under one or other of the clauses set out in Schedule II. On a reference to that Schedule, it appears to be plain that the deceased cannot be brought under any one of its clauses. Reference was made to clause (xviii), but that clause is specifically and expressly limited to persons employed on any estate which is maintained for the purpose of growing cinchona, coffee, rubber or tea. An estate maintained for the purpose of growing any other crop is not included in the clause. The only other clause to which reference was made was clause (ii), but the language of that clause is so plain that, to my mind, it excludes itself. The clause has reference to premises wherein, or within the precincts whereof, a certain number of persons had been employed in any manufacturing process, as defined in the Factories Act of 1934, or in any kind of work whatsoever incidental to or connected with any such manufacturing process and where power is used. Mr. Mallik referred to the finding of the Commissioner that the undertaking of the appellant comprised manufacturing activities as well and it was on the basis of that finding that he claimed the deceased to be a workman under clause (ii) of Schedule (II). It is however clear that what clause (ii) contemplates are persons employed in the premises where the manufacturing process is carried on. It does not cover persons who may be connected with a concern which carries on a manufacturing process, but who, so far as they themselves are concerned, are employed in outdoor work. The governing provision in the clause is that the persons contemplated by it must be employed in premises of a certain kind and the clause then proceeds to say that the premises must be like. The premises must satisfy two conditions, one of which is that on any one day during the preceding twelve months, ten or more persons must have been employed there in a manufacturing process or in any kind of work connected with such process or with the articles made and the other of which is that steam, water or electrical power must be used in the premises. Persons working within such premises, though not employed in the manufacturing process proper, are within the definition, but persons working outside are not, though they may be serving the concern. If the deceased had been employed at a place where the *sabai* grass was stacked or made into bundles or processed or otherwise made ready for sale, and if those operations could

be described as a manufacturing process and if, further the statutory number of workmen had been employed at the place on any one day during the proceeding twelve months and power of one of the specified kinds was used, it might have been said that the deceased was a workman. But on the statement of the applicant herself, her son had been employed only as a grass-cutter and his work lay in the fields. There is again nothing to show what the number of persons employed in the concern was or that steam, water or electrical power was used. I am, therefore, of opinion that clause (ii) also cannot be said to cover the case of the deceased.

There is no other clause which can be said to be even remotely capable of covering the case of the deceased. It must, therefore, be held, however unfortunate the conclusion may be, that the deceased was not a workman within the meaning of the Act and therefore his dependent mother was not entitled to maintain an application for compensation.

The appeal is accordingly allowed. The judgment and order passed by the Commissioner for Workmen's Compensation are set aside and the application for compensation is dismissed. Under an order passed by us at a previous stage, a sum of Rs. 200/- was allowed to be withdrawn by the respondent. It has been very generously stated before us by Mrs. Burman on behalf of his client, the appellant, that the appellant does not insist on the respondent paying back the money she has withdrawn. The concession made by the appellant will, therefore, be recorded.

We make no order as to costs either of the trial Court or of this appeal.

B. K. Guha, J.—I agree.

S.G.P.

Appeal allowed.

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ORIGINAL CIVIL SUIT No. 100 of 1953
 Before Mr. Justice P. B. Mukharji
 JAYASWAL SHIPPING COMPANY,
 THE OWNERS & PARTIES INTERESTED
 IN "S.S. LEELAVATI"

1953,
 December, 23.

*Admiralty Jurisdiction—Nature, Scope, and extent of Admiralty Jurisdiction—
 —Suit on claims for necessities supplied to the ship—Circumstances
 under which a suit may be brought on the Admiralty Jurisdiction—
 Admiralty Jurisdiction cannot be invoked while ordinary jurisdiction is
 open—Admiralty Jurisdiction available only where the owner or part
 owner is not domiciled in India.*

The Admiralty Jurisdiction over a claim for necessities is recognised to avoid the difficulties which a supplier of necessities normally felt in realising his claim either against the ship or the owner thereof. The difficulty of obtaining remedy where necessities were supplied to a foreign ship and she left the Port without paying for them is obvious. Equally obvious is the difficulty where even in the case of a domestic ship, she left the Port without paying for necessities supplied while in Port, if the owner was not domiciled in the territory of the Court exercising jurisdiction over the Port.

If the ship belonged to the Port where the necessities were supplied, then there was no need for invoking the jurisdiction in Admiralty and the Courts of Common Law Jurisdiction and the Ordinary Courts of the land provided sufficient forum for adjudication of the claims for necessities supplied to the ship and in a proper case even for attachment before judgment in such ordinary actions. Similarly again, if the owner of the ship was himself domiciled in the country where the ship was supplied with necessities, then the Courts of Common Law and the Ordinary Courts of the land were adequate enough to grant effective remedy to the suppliers who were not paid their claims for the necessities supplied to such a ship.

This (grounds stated above) being the national of the basis of Admiralty Jurisdiction specially recognised by statute, there is no ground or justification to create or extend Admiralty Jurisdiction in a case of necessities where the ship is not foreign or where the owner of the ship is domiciled in the territory of the Courts of the land where the necessities were supplied.

Suit under Admiralty Jurisdiction of the High Court.

Claims for necessities supplied to the steamship S.S. Leelavati.

* Original Side Suit No. 6 of 1953.

The material facts will appear from the judgment of the Court. *D. R. Das*, for the Plaintiff, and *R. Chowdhury*, for the Defendants.

The judgment of the Court was as follows:—

P. B. Mukharji, J.—This is an Admiralty action in this High Court. It raises an intricate but interesting point of Admiralty Jurisdiction. To put it graphically, the point of construction raised in the suit is how the words "domiciled in England or Wales" appearing in Section 5 of the Admiralty Court Act, 1861 (24 Victoria, Ch. X) can be dovetailed in the topography of India, and when so done what will be the scope and extent of the meaning of those words. The ancient lumber of admiralty law in India is in need of immediate legislative spring cleaning, so that her citizen of today may be spared in future from the task of solving such problem of Indianising English geography by having to interpret English Statutes.

Before discussing this point which does not appear to be covered by any decision in India, it is essential to state the necessary facts.

The suit is instituted by Jayaswal Shipping Company, a registered partnership, against the owners and parties interested in the Steamship "S.S. Leelayati" for a decree for the sum of Rs. 33,041-15-3 p. being the amount alleged to be due to the plaintiff by the defendant for supplying necessaries in connection with the operations of the said vessel at the Port of Calcutta. It is conceded and admitted by Mr. R. Choudhury, learned counsel for the defendants, that necessaries were supplied. He, however, does not admit the amount claimed although he admits that the claim is on account of necessaries. Such admission, therefore, is recorded in the proceedings of the suit, because in paragraph 6 of the affidavit in opposition of Chinam Surrya Narayan Murti affirmed on the 6th October, 1953, there is the allegation that "It does not appear from the said petition that any necessaries were supplied or moneys paid for necessaries in connection with the operation of the said vessel." This ad-

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mission; therefore, makes it unnecessary to take any evidence on the point whether necessities were supplied. On the side of the plaintiff also there has been a concession on a point of fact by Mr. D. R. Das, learned counsel for the plaintiff. The admission by the plaintiff is that Chinam Suryya Narayan Murti, the owner of "S.S. Leelavati," is permanently domiciled in India and is a citizen of the Union of India. That admission is also recorded in the proceedings of this suit. What is admitted in paragraph 3 of the plaintiff's petition is that Chinam Suryya Narayan Murti, the owner of "S.S. Leelavati," carried on and still carries on business under the name and style of "Andhra Steamship Company" at No. 397 T. H. Road, Madras and that such Steamship is registered in the Port of Madras. In the affidavit used by Chinam Suryya Narayan Murti it is said in support of his allegation of permanent domicile in and citizenship of India that he is a voter and he has exercised his right of franchise at the last Election for Parliament as well as for the Madras Legislative Assembly. The admission of the learned counsel for the plaintiff on the point of Murti's Indian domicile, therefore, makes it unnecessary to take any evidence on this point. I may also state here that neither in the plaint nor in the petition for arrest of the ship was any allegation made by the plaintiff that the defendant was not of Indian domicile. These are all the facts that need be stated for deciding the issue raised in this controversy.

A brief reference, however, to the interlocutory proceedings in this suit will not be out of place before taking up the discussion of the point of admiralty law and this High Court's jurisdiction thereunder. The plaintiff moved an application on petition in the Admiralty Jurisdiction of this Court before the learned Vacation Judge. The application was for a Writ of Arrest and seizure by the Marshal of this Court to seize and detain and arrest the said vessel "S.S. Leelavati" lying in the Port of Calcutta on the river Hooghly. An order was also asked for in that application for furnishing security by the defendant for the sum of Rs. 33,041-15-3 p being the claim in the suit and the other incidental relief of injunction restraining the defendants, their servants and agents from removing the vessel from the Port of Calcutta during the hearing of the suit. On the 25th September, 1953 the plaintiff moved this application and

obtained the order from the learned Vacation Judge for arrest and seizure of the Ship. This order however also directed notice of this application to the owner of the vessel to show cause against the arrest by the 30th September, 1953 during the vacation, when the application was ordered to appear on the Cause List. Pursuant to this order "S.S. Leelavati" was duly arrested and seized by the Marshal of this Court. The application having been made returnable during the Vacation on the 30th September, 1953, duly appeared on the Cause List. On that date the application was by consent adjourned till the 6th October, 1953, in the Vacation with leave to discharge the cargo, in the meantime and payment of the daily charges of the Marshal. When the application again appeared on the List on the 6th October, 1953, an interim order was made continuing the arrest of the Ship till the "final disposal of the application" with liberty to the defendant to get the Ship released in the meantime, on furnishing security to the satisfaction of the Registrar for the entire claim of the petition. The order also provided that in case it was decided finally on the application that this Court did not have jurisdiction, then the security would stand cancelled. The defendant, however, did not furnish security as aforesaid with the result that the ship has continued to be under arrest. With that order the application was adjourned till after the Vacation. The matter now comes up before me as exercising the Admiralty jurisdiction of this Court for final disposal.

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By consent of counsel, appearing on either side, no evidence is given in this case at this stage and by similar consent the only point urged on behalf of the defendant is that this Court has no jurisdiction to direct the arrest of the Ship on the facts I have stated above. Its effect is that the Motion is treated as a suit because the decision on the point of jurisdiction on this Motion if it goes against the plaintiff will dispose of the suit, although in case the point is found in favour of the plaintiff, the further question of the amount will remain to be decided on evidence.

The Admiralty Jurisdiction in this High Court is an ancient inheritance. Clause 26 of the Charter of 1774 defines the Admiralty Jurisdiction of the Supreme Court. It made the Supreme Court of Judicature, at Fort William in Bengal, the

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Court of Admiralty, in and for the provinces, countries or districts, of Bengal, Behar and Orissa, and all other territories and islands adjacent thereunto. It gave power to the Supreme Court to hear, examine, try and determine and take cognizance of all causes, civil and maritime, and "all pleas of contracts," and "all matters and contracts which in any manner whatsoever relate to freights or money due for ships hired and let out, transport money, maritime, usury or bottomry or to extortions, trespasses, injuries, complaints, demands, and matters, civil and maritime, whatsoever, between merchants, owners and proprietors of ships and vessels, employed or used within the jurisdiction or between other contracted, done, had, or commenced, in, upon or by the sea, or public rivers, or ports." This clause describes the admiralty jurisdiction of the Supreme Court "as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents and dependencies annexed." This inheritance was continued by Clause 31, of the Letters Patent of 1862 which in its turn was continued by Clause 32 of the Letters Patent of 1865. Section 106 of the Government of India Act, 1915, continued the existing Admiralty Jurisdiction in the High Courts in India. It was preserved by Section 223 of the Government of India Act, 1935 and its adaptations. Finally, Article 225 of the Constitution of India lays down that the jurisdiction of any existing High Court shall be the same as immediately before the commencement of the Constitution subject, of course, to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by the Constitution. No such Legislature since the Constitution has made any law touching the Admiralty Jurisdiction of this Court on the point under consideration. That is a brief account of how the present High Court in Calcutta is vested with the Admiralty Jurisdiction. As this survey will show the fenestration of this High Court's Admiralty Jurisdiction remains Clause 26 of the Charter of the Supreme Court of 1774.

In order, therefore, to determine the nature, scope and extent of Admiralty Jurisdiction of the High Court in Calcutta, the words of Clause 26 of the Charter of 1774 are material. As already indicated, Clause 26 of the Charter 1774 in short gives

the jurisdiction of the Admiralty "as the same is used and exercised in that part of Great Britain called England together with all and singular their incidents." This again makes it necessary to examine the basis and scope of the Admiralty Jurisdiction exercised by the Court of Admiralty in England. The Admiralty Jurisdiction in England is of great antiquity. In England the Court of the Lord High Admiral as a corollary to the criminal jurisdiction which it possessed, began to hear disputes also in civil matters connected with the sea and gradually usurped the jurisdiction over cases arising in inland tidal waters. Then began the conflict between the usurping authority of the Court of the Lord High Admiral and the existing Courts of Common law. As a result of this encroachment on the province of the Courts of Common Law, two statutes were passed in the reign of Richard II to limit the jurisdiction of this new authority. In Article 93, Vol. I. of Hailsham's Edition of Halsbury's Laws of England it is expressly pointed out "the civil jurisdiction of the Admiralty continued within the limits laid down by the statutes of Richard II, but its exercise from the reign of Elizabeth I to the reign of Charles II involved the Admiralty Court in a long struggle with the superior Courts of Common Law." The ultimate result of this conflict led to the civil jurisdiction of the Admiralty Court being considerably narrowed and curtailed in practice and it appears that the jurisdiction of the Admiralty was confined to (1) collisions between the ships, (2) injurious acts committed on the high seas outside the body of any county, (3) salvage service rendered to property on the high seas and between high and low water mark, but otherwise not within the body of any county, (4) droits of Admiralty, (5) possession of ships where no title was in question, (6) bottomry, so called because money had been lent on the security of the bottom of the ship, (7) respondent's bonds on cargo, (8) claims of seamen's wages where there had been no pirates, (9) jurisdiction over the goods of pirates and goods partially taken and (10) suits against masters of ships for assaults and battery committed on the high seas where the complainants were officers, seamen or passengers of the ships. From this list it will appear that a claim for necessities supplied to a ship did not form an expressly mentioned part of Admiralty jurisdiction in England. How far a claim for necessities supplied to a ship came within the Admiralty Juris-

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diction, therefore requires a special treatment.

Although from time to time the Court of Admiralty in England claimed a jurisdiction over actions for necessities, the validity of such claim was debatable. This doubtful legal position is cautiously described in Article 93 of the First Volume of Hailsham's Edition of Halsbury's Laws of England "actions in respect of necessities supplied on the high seas and for towage on the high seas seem also to have been within the jurisdiction, but seldom, if ever, occurred in practice." In the Fifth Edition of Roscoe's Admiralty Jurisdiction and Practice at page 202 the legal position is clarified by the statement. "Although from time to time the Court of Admiralty claimed a jurisdiction over actions for necessities, it was decided once for all in *William Hodges v. Jacob Sims & Wm. Unwin Sims* (1), that it did not possess it. By the Admiralty Court Act 1840 (3 & 4 Vict. Chap. 65, Section 6) the Court of Admiralty acquired jurisdiction over claims for necessities supplied to any foreign ship or sea-going vessel." It is unnecessary, however, to speculate here whether the Court of Admiralty in England originally had or had not jurisdiction in the case of necessities supplied to a ship because the legal situation was made quite clear not only by the Admiralty Court Act 1840 but subsequently also by the Admiralty Court Act 1861 (24 Vict. Ch. 16). In its Preamble this Admiralty Court Act of 1861 after having said, "it is expedient to extend the jurisdiction and improve the practice of the High Court of Admiralty of England," proceeds to provide in Section 5 of this Admiralty Court Act, 1861:—

"The High Court of Admiralty shall have jurisdiction over any claim for Necessaries supplied to any ship elsewhere than in the Part to which the Ship belongs, unless it is shown to the satisfaction of the Court that at the time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales: Provided always, that if in any such Cause the Plaintiff do not recover Twenty Pounds he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said court."

(1) (1835) 3 Knapp. P.C. 94.

On this point the observations of Blackburn J. in his judgment in *Ex Parte Michael* (1), are illuminating and that learned Judge elucidates the law in these terms:—

"The rule of the Common Law was that the Court of Admiralty had no jurisdiction over a cause for necessities supplied to a ship at home that belonged to the Courts of Common Law. Then it was enacted that the Court of Admiralty should have jurisdiction over a claim for necessities supplied to any ship elsewhere than at the Port to which the ship belongs. That seems clearly enough to enact that the Admiralty Court shall have jurisdiction when the necessities are supplied in England, just as if they have been supplied abroad; but then it is added, unless it is shown to the Court that the owner be domiciled in England; but that must be alleged and proved to the satisfaction of the Court before judgment; and it is too late afterwards."

No question of point of jurisdiction being taken too late arises in this case, because the point is taken at the first opportunity on the interlocutory application before judgment in suit and immediately after the plaintiff obtained the *ex parte* order for arrest of the Ship.

This, therefore, is the Admiralty Jurisdiction in England with regard to any claim for necessities. It postulates two requirements, both of which are indispensable to attract the Admiralty Jurisdiction. The first postulate is that the supply to the ship must be elsewhere than in the port to which the ship belongs. This is said to be satisfied in the present case before me because the ship in question belongs to the Port of Madras and not to the Port of Calcutta where the supply of necessities was made. The second postulate under Section 5 of the Admiralty Act, 1861 is that the owner or part owner of the ship must not be domiciled in England or Wales. It appears to me that the principle of domicile is a basic foundation of the jurisdiction of the Admiralty Court in England in a claim for necessities. The question, therefore, arises here now under that principle those words "domiciled in England or Wales"

(1) (1972) L.R. 7 Q.B. 658-660.

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in Section 5 of the Admiralty Court Act, 1861 are to be applied in India.

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For this purpose it is necessary to refer to yet again another English Statute, namely, the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. Chap. 27). This was an Act which according to its Preamble was passed to amend the law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominion and elsewhere out of the United Kingdom. Section 2(1) of this Act provides:—

"Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole Judicial authority, the expression "Court of Law" for the purposes of this section includes such Governor."

On this basis the High Court in Calcutta having regard to its jurisdiction inherited from the Supreme Court became the Colonial Court of Admiralty. By the provisions contained in Section 2 of the Colonial Courts of Admiralty (India) Act of 1891 High Courts of Calcutta, Bombay, Madras and the then District Court of Karachi were expressly declared the Colonial Courts of Admiralty.

The next sub-section of the English Act of 1890 is also important in this connection. Section 2(2) of the Colonial Courts of Admiralty Act, 1890 provides:—

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty Jurisdiction of the High Court in England, whether existing by

by virtue of a Statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the Comity of Nations."

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This provision makes it clear that the Admiralty jurisdiction of this High Court in Calcutta is the same as the Admiralty jurisdiction in the High Court in England. Mr. Justice Panckridge took the same view on this point in *Shanker Maru* case (1).

The crux of the problem of interpretation presented in this case before me arises, however, on the language of proviso (a) to section 2 of the Colonial Courts of Admiralty Act, 1890. This proviso states:—

"Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales."

By section 18(2) of the Interpretation Act, 1889 (52 & 53 Victoria, Chapter LXIII) the words "British possession" as mentioned in the proviso (a) of the Colonial Courts of Admiralty Act, 1890 mean "any part of Her Majesty's Dominions exclusive of the United Kingdom, and where parts of such Dominions are under both a Central and local legislature, all parts under the Central Legislature shall for the purposes of this definition be deemed to be one British possession." As the previous Government of India Acts continuing the Admiralty jurisdiction conferred on this Court by the Charter of 1774, were acts of the Imperial Parliament, the problem of construction here presented in this suit is that by reason of proviso (a) to section 2 of the Colonial Courts of Admiralty Act, 1890 the words "domiciled in England or Wales" in section 5 of the Admiralty Court Act, 1861 have to be read as "domiciled in the Union of India" now under the Constitution of India. That is the obvious and *prima facie* import of the words "all parts under the Central Legis-

(1) (1937) A.I.R. Cal. 122.

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lature shall for the purposes of this definition be deemed to be one possession." That meaning can only be replaced if there is any thing repugnant to the context showing "a contrary intention" an expression used in the opening words of Section 18 of that Interpretation Act of 1889. In the case of *Madras Steam Navigation Company Limited v. Shalimar Works Limited* (1), Chief Justice Jenkins deciding an appeal from a suit on the Original Side and dealing with a cognate subject observed in the year 1914 at page 106 of the Report:—

"British India and Burma thus take the place of England and Wales for the purposes of this case."

In the present context under the Constitution of India on a party of reasoning followed by Chief Justice Jenkins the Union of India takes the place of England and Wales for the purpose of the suit now before me.

I have not been able to find any reported Indian decision on this point nor was any such decision referred to at the Bar in the course of arguments. Reference was made at the Bar to the case of *Madras Steamship Navigation Company Limited v. Shalimar Works Limited* (1). That was a decision of the Court of Appeal from a judgment in a suit instituted not in the Admiralty Jurisdiction but in the ordinary original civil jurisdiction of this Court. That was an aftermath of the dismissal of a suit in the Admiralty Jurisdiction against a vessel by the name "Clan Mackintosh" by Chitty, J. on the ground of jurisdiction. The decision in *The Madras Steamship Navigation's case* (1) was given in a suit brought in the ordinary original civil jurisdiction of this Court by the Owner of the ship after its release by Chitty, J. for damages for the ship's wrongful arrest without jurisdiction and without reasonable or probable cause. The Admiralty action was commenced for a claim for necessities supplied to the ship. There is no reported judgment of Chitty, J. in the Admiralty Action but in the report of the judgment delivered in the suit of the ordinary original civil jurisdiction of the Court, the learned trial Judge Fletcher, J. made certain observations which are to be found at page 92 which appear to be the inspiration of Mr. Das's argument. Fletcher, J. observed:—

(1) (1914) I.L.R. 42 Calc 85.

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"It is said that this Court has no jurisdiction although the owner resides in any other part of British India to arrest the ship. I am not prepared to say that is so. It is not easy to read the provisions of this Statute (Colonial Courts of Admiralty Act 1890) if you are to read the British possession as being the whole of British India and various different High Courts. However, it is unnecessary in this case in my opinion to determine that point."

It was unnecessary in that case because the case which Fletcher J. was trying was not one in the Admiralty Jurisdiction at all. In the Court of Appeal although Jenkins, C.J. and Stephen, J. dismissed the appeal there is an observation of Jenkins, C.J. which does not appear to support the doubts expressed by Fletcher, J. Jenkins, C.J. construing the Colonial Courts of Admiralty Act, 1890 observed at page 106 of that report which I have already quoted, "British India and Burma thus take the place of England and Wales for the purposes of this case."

Mr. Das appearing for the plaintiff has submitted before me that because in the Indian Union at present there are at least three different and separate Courts of Admiralty, namely, the Bombay High Court, the Madras High Court, and the Calcutta High Court each exercising Admiralty jurisdiction under its respective Charters and letters Patent, the proper meaning to be attributed to the words "domiciled in England or Wales" in section 5 of the Admiralty Court Act, 1861, read with section 2(2) of the Colonial Courts of Admiralty Act, 1890 and the Interpretation Act of 1889, should be such as not to create any conflict between these different Courts of Admiralty in India. The argument thus put forward is a very able argument and requires great consideration.

The force of the argument is illustrated by pursuing the results that will follow if the words "domiciled in England or Wales" are construed as domiciled in the Indian Union. According to Mr. Das, the result will be that the High Court of Calcutta in its Admiralty Jurisdiction will in that event be empowered to arrest ships at ports in Bombay or Madras concurrently with the Bombay or Madras High Courts. It is

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therefore, envisaged that there may be conflict of jurisdiction between these different courts of Admiralty in India if the interpretation of the words "domiciled in England or Wales" be domiciled in the Indian Union. It is, on that ground, contended that a construction which leads to conflict between Courts of co-ordinate jurisdiction should be avoided. The reasonableness of this argument is unquestioned.

The next step in the enquiry is that if the words "domiciled in England or Wales" are not to be interpreted as domiciled in the Indian Union, what then is going to be the interpretation of these words. Mr. Das's submission on this point is that the words "domiciled in England or Wales," should be interpreted to mean as domiciled within the Admiralty Jurisdiction of the respective Courts of Admiralty in Calcutta, Madras or Bombay. He has contended that the words "domiciled in England or Wales" should be construed in the light of the basic fact that there was one Court of Admiralty in England and Wales. It is, therefore, suggested that the word "domiciled" should not be taken in its narrow technical sense but only as indicative of an area co-terminus with the area of jurisdiction of the Court of Admiralty. The significance of the argument appears from the result that follows if that view is accepted. The result then is that if the word "domiciled in England or Wales" can be interpreted to mean domiciled within the jurisdiction of the Court of Admiralty in England and Wales then those words when transplanted in India would mean domiciled within the jurisdiction of the Court of Admiralty of the High Court of Calcutta. In support of this argument it is said that section 18(2) of the Interpretation Act of 1889 read with proviso (a) to section 2 of the Colonial Courts of Admiralty Act, 1890 does not stand in the way because section 18 of the Interpretation Act uses the well known words "unless the contrary intention appears." It is argued that the contrary intention does appear here to prevent the application of section 18(2) of the Interpretation Act because construction in accordance therewith will lead to the conflict of jurisdiction between the different Courts of Admiralty in India, such as, the Bombay High Court, the Madras High Court and the Calcutta High Court. Other support is given to this argument from a variety of considerations. First, it is argued on the authority of the obser-

uations made by Sir Barnes Peacock in the Privy Council decision of *Susan McMullen v. Wadsworth* (1), that the word domicile in this context should not be understood in its strict sense. There the learned Judge observed:

"Much confusion has arisen from the use of the word 'domicil' in two different senses. Sir Robert Phillimore, in his work on the Law of Domicil (p. 17), remarked, and in their Lordships' opinion correctly so, that it might have been more correct to have limited the use of the word domicile to that which was the principal domicile, and to have designated simply as residences the other kinds of domicile, but a contrary practice has prevailed, and the neglect to distinguish between the different subjects to which the law of domicile is applicable has been the chief source of the errors that have occasionally prevailed on this subject."

In that case the Privy Council came to the conclusion that the word "domicil" in Article 63 of the Civil Code of Lower Canada was used in the sense of residence and did not refer to international domicile.

The other consideration used in support of the argument is that even though there may be one Indian domicile in strictly legal sense, different domicils varying with different States in India may be conceived for certain purposes. To help the argument a reference has been made on this point to a Pre-Constitution State Statute of Bombay called the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Bombay Act No. XXV of 1946). Particular reference is made to section 4(b) of that Act which provides:—

"Notwithstanding any law, custom or usage to the contrary, a bigamous marriage shall be void if it is contracted beyond the limits of this Province after the coming into force of this Act and either or both the contracting parties to such marriage are domiciled in this Province."

The use of the words "are domiciled in this Province" is taken to indicate that domicile can also be understood in certain

(1) (1889) 14 A.C. 631 at 634.

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set of circumstances as appertaining to the State. It is, therefore, said that there is no reason why the words "domiciled in England or Wales" should not be construed as domiciled in the State of which the High Court of Calcutta functions as the Court of Admiralty.

The other consideration drawn in support of this argument is that if an Indian domicil in its strictly legal connotation is substituted for the words "domiciled in England or Wales," then it will make the construction of sections, other than section 5, of the Admiralty Court Act, 1861 impracticable, if not impossible. For this purpose reference is made to sections 6 and 8 of the Admiralty Court Act, 1861 where the expression "England or Wales" occurs. Section 6 of that Statute relates to claim for damages to imported cargo and gives the High Court of Admiralty in England jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried time of the institution of the cause the Owner of the Ship was goods by the negligence or misconduct or breach of contract unless it is shown to the satisfaction of the Court that at the time of the institution of the cause the Owner of the Ship was domiciled in England or Wales. It is argued that this will again mean if the Indian domicile is substituted for those words, then the Calcutta High Court will be determining as a Court of Admiralty claims for damages for imported cargo although the cargo and the ship are at Bombay. So again it is pointed out that section 8 of that Act gives jurisdiction to the High Court of Admiralty in England to decide all questions arising between co-owners relating to ownership, possession, employment and earnings of any ship registered in any port in England or Wales. By way of illustration on this section it is argued that if the words "England or Wales" are to be read as "The Union of India" then if there is a dispute between the co-owners in Bombay over a ship then one co-owner in order to be obnoxious and harassing to other co-owners can come to Calcutta and sue them in the Admiralty jurisdiction of the Calcutta High Court, although all the other co-owners, the ship and all accounts and papers are at Bombay.

It will be appropriate also to notice at this stage another argument advanced by Mr. Das that the constitution of India

does nowhere lay down any definition or requirement of one Indian domicil. It is argued first that reference to domicil that is made in Article 5 of the Constitution of India is only in the context of citizenship and, secondly, that such reference is consistent with domicil being understood as appertaining to different States in India. The language of Article 5 of the Constitution is "every person who has his domicil in the territory of India." It is said that that only means that a person has to have his domicil somewhere within the territory of India, but it does not mean that the Indian domicil is one. Indeed, it is argued that by Article 1(3) of the Constitution of India the territory of India is said to include the territories of the States, and therefore the words "domicil in the territory of India" can legitimately include notions of domicil in the different States in India.

For these reasons, it is urged before me that the words "domiciled in England or Wales" must be understood not to create or refer to any Indian domicil and that the word "domicil" in this context is not used in its strict sense but in the loose sense as defining the area of each Court of Admiralty in India.

Domicil is a legal term whose contours have often been found to be vague in jurisprudence. In England the English and the Scottish domiciles are different and therefore the argument of Mr. Das that the words "domiciled in England or Wales" specially excluded Scottish domicil and were confined to the area of England and Wales, for which there was and is one Court of Admiralty, acquires added significance. But the question nevertheless whether when applied to the Colonial Courts or other British possessions at that time under the Colonial Courts Admiralty Act, 1890, the same ideas should be imported still remains to be decided. The comparison between English and Scottish domiciles are likely to be misleading because the Scottish legal system and the English legal system are very different in material particulars. Behind the idea of domicil is the notion that all persons who have or whom the law deems to have their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends and its corollary that they are domiciled in

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the whole of that country, although their home may be fixed at a particular spot within it. "In Halsbury's Edition of Halsbury's Laws of England, Vol. VI, pp. 198-9, Article 242 this idea is forcefully brought out. Dicey in his work on Conflict of Laws propounds the same principle and the learned Editor of the 6th Edition of that work at page 83 lays down the proposition in these terms:—

"The area contemplated throughout the Rules relating to domicile is a country or territory subject to one system of law."

Now, if the existence of "one system of law" is a valid criterion for determining the area of domicile, then I feel that it cannot be seriously disputed to-day that the whole of the Indian Union should be regarded as the area of domicile wherein "one system of law" prevails with Indian Parliament holding all residuary powers of legislation in spite of the existence of different State Statutes on specified subjects. That consideration points to a conclusion in favour of the integrity of the Indian domicile in that context.

Sir Barnes Peacock's observation, therefore, that the word "domicil" is used in many contexts in a loose sense cannot be taken to cover the length of overriding the central idea of the area of the domicile being the entire area where one system of law prevails. It does not also appear to me that the appeal to pre-Constitution Bombay Statute of 1946, namely, the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 can in this context held in establishing different domiciles in different States in India. There the Statute itself can be construed to have placed its own meaning on a domicile. But such notions are, in my view, inappropriate in construing the words "domiciled in England or Wales" in the Admiralty Courts Act of 1861. As against that pre-Constitution State Statute it may be pointed out that the previous Government of India Acts of the British Parliament which regulated the constitution of the then British India did not expressly contemplate separate domiciles for separate Provinces of those times and there are many cases relating to domicile which speak of only one Indian domicile even at that time. It is in every case, in my view, the terms of

the Statute as well as its subject that should determine the meaning to be given to the word "domicile" because the word "domicile" itself is of many meanings in law. The Constitution of India, it is true, does not expressly lay down that there can be only one Indian domicile. Equally however the constitution of India does not expressly recognise separate domiciles for different States in India. It is true that Article 5 of the Constitution only refers to "every person who has his domicile in the territory of India" which territory includes the territories of the different States. From that it does not follow necessarily that the Constitution expressly recognises different State domiciles in India. This much is clear that the Indian Constitution proceeds on the basis of one Indian citizenship. It is not inappropriate in that context to consider that one citizenship would normally, though perhaps not invariably, favour one domicile provided the basic notion of "one system of law" prevails in the country of which he is a citizen. One citizenship with different State domiciles may create many incongruous situations where a citizen of India is by Constitution given the right to reside and settle in any part of the territory of India with such rights as to acquire, hold and dispose of property and to move freely throughout the territory of India and these rights are relevant in determining domicile. I am inclined to take the view that in the Indian constitutional framework one Indian domicile is more in accord with its spirit than different State domiciles. At any rate, such notion of one Indian domicile is not inappropriate in the context of Admiralty Jurisdiction which has to be decided by me in this application. The comparison in this regard with American Constitution with its different laws of domiciles and where at one stage even different citizenships in different States were possible, is therefore, in my view, unjustified in the Indian constitutional context.

The fear of a possible conflict between different Courts of Admiralty if the words "domiciled in England or Wales" are interpreted to mean domiciled in the Indian Union, appears on a close analysis to be over-done. If each of the Admiralty Courts in India exercises the jurisdiction on the basis of one Indian domicile, then while in theory it is possible to say that the High Court of Bombay may happen to be exercising jurisdiction over a ship or a person in Calcutta, in practice it does not appear to

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me to be a situation which will hardly arise. The previously instituted proceedings in any one of these Courts of Admiralty will preclude the same matter being subsequently agitated by another Court of Admiralty not only by a Comity of Courts working in the Indian Union backed up now by the full faith and credit clause of the Constitution contained in its Article 261, but also by the procedure of stay of proceedings in courts of concurrent jurisdictions dealing with the same subject-matter and the powers of injunction relating to chartered High Courts in case of abuse of the choice of forum. By such means the conflict can always be avoided.

The cogent answer to the argument of fear of possible conflict between these different Courts of Admiralty in a case of necessities supplied to a Ship lies in the fundamental notion adverted to by Blackburn, J. and embodied in the English Admiralty Court Act, 1861. This notion is clearly expounded by Roscoe in the 5th Edition of Admiralty Jurisdiction and practice at p. 205 in the following terms:—

"To render a ship liable in an action, she must further be either a foreign ship, the owner of which may or may not be temporarily in the same port or a British Ship, the owner of which is not shown to the satisfaction of the Court to be domiciled in England."

The principle behind it is not far to seek. The Admiralty Jurisdiction over a claim for necessities is a comparatively new jurisdiction in Admiralty and was specially recognised by Statute in England to avoid the difficulties which a supplier of necessities normally felt in realising his claim either against the ship or the owner thereof. The difficulty of obtaining remedy where necessities were supplied to a foreign ship and she left the Port without paying for them, was obvious. Equally obvious was the difficulty where even in the case of a domestic ship she left the Port without paying for the necessities supplied while in Port, if the owner was not domiciled in the territory of the Court exercising jurisdiction over the Port. These basic notions are emphasised by the statutory words that the ship must be at a Port "elsewhere than in the Port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the

time of the institution of the cause nor Owner or Part Owner of the Ship is domiciled in England or Wales. The entire history of the evolution of Admiralty Jurisdiction is eloquent proof why such considerations were regarded as essential. If the ship belonged to the Port where the necessities were supplied, then there was no need for invoking the jurisdiction in Admiralty and the Courts of Common Law Jurisdiction and the ordinary Courts of the land provided sufficient forum for adjudication of the claim for necessities to such a ship and in a proper case even for attachment before judgment in such ordinary actions. Similarly, again, if the Owner of the Ship was himself domiciled in the country where the ship was supplied with the necessities, then the Courts of Common Law and the ordinary Courts of the land were adequate enough to grant effective remedy to the suppliers who were not paid their claims for necessities supplied to such a ship. This being the rationale of the basis of Admiralty Jurisdiction specially recognised by Statute, there is no ground or justification to create or extend Admiralty Jurisdiction in a case of necessities, where the ship is not foreign or where the owner of the ship is domiciled in the territory of the Courts of the land where the necessities were supplied.

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Now in this case before me the ship is a ship registered in the Port of Madras within the Indian Union, and the Owner of the ship is domiciled in the Indian Union and, therefore, an ordinary action for claim for necessities in the ordinary original civil jurisdiction of the Courts of the land are available to the plaintiff. In such an action within the ordinary original civil jurisdiction, the plaintiff can even avail of clause 12 of the Letters Patent of this High Court and if under the terms of that clause he can bring the suit with leave in this High Court, then he is competent enough to file a suit in the ordinary original civil jurisdiction of this Court and if that is not available, even then he has the ordinary courts in Madras available to him. Neither the history nor the logic of Admiralty jurisdiction permits in my view a replacement of or encroachment on the ordinary courts' jurisdiction over a claim for necessities. Nor does such history or logic permit a competition between Courts of Admiralty and Courts of Ordinary Original Civil Jurisdiction. Courts of Admiralty are courts of specific jurisdiction and if a controversy does not come within their specific jurisdiction, they

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cannot entertain it, and in that respect are unlike the courts of residuary jurisdiction, such as, the Common Law Courts or in India the courts of ordinary original civil jurisdiction. For these considerations, therefore, I am unable to uphold the argument that if the words "domiciled in England or Wales" are interpreted to mean domiciled in the Indian Union then that interpretation will lead to conflict between the different Courts of Admiralty in Bombay, Madras and Calcutta. It is in my opinion based on an unjustified apprehension and the possible conflict feared by that interpretation can never arise if the limits of the Admiralty jurisdiction are observed. In my judgment the emphasis in Admiralty jurisdiction dealing with a claim for necessities is not so much territorial as objective.

The controlling reason in such a case is provided by the consideration that when the ordinary Civil Courts of the territory within which one system of law prevails are open for granting a relief in a claim for necessities supplied to a ship, as for instance a suit in this case for necessities will lie in the ordinary Courts either in Madras or even here, if it is otherwise a fit case for leave under Clause 12 of the Letters Patent for this High Court or section 20 of the Civil Procedure Code for other Courts in this State, then the plaintiff cannot be allowed to invoke the Admiralty Jurisdiction which is a special jurisdiction of this High Court. This conclusion appears to me to be in keeping with the history of the Admiralty law so far as the claim for necessities is concerned. The English Admiralty Court Act of 1840 which introduced for the first time the claim for necessities as a part of Admiralty Jurisdiction in England made it quite clear that the ship had to be a foreign ship and the reason for that was that otherwise there was no relief open or available in the ordinary courts of law in the country where the necessities were supplied. The subsequent alteration of the Admiralty Law in 1861 by the English Admiralty Court Act, 1861 also appears to have a restricted idea when it says that the supply of necessities has to be made at a port to which the ship does not belong and the owner of the ship must not be domiciled in England or Wales. It is plain therefore that it was never intended that the Admiralty Court should have an unqualified jurisdiction over all claims for necessities. The reason for excluding these two cases from Admiralty Jurisdiction is that

in either case where the ship is registered at the Port where the supplies were made, or the case where the owner of the ship himself is domiciled in the country, then the supplier can seek his remedy by the ordinary processes of law in the ordinary civil courts of the land. Applying that principle of exclusion to the present context, I am of the opinion that as here the supplier can sue in the ordinary civil courts of the land where the same system of law prevails, this Court cannot exercise its Admiralty Jurisdiction to entertain such claim.

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The suit, therefore, fails on the point of jurisdiction and is dismissed with costs.

Anil Ghosh: Solicitor for the Plaintiff.

A. Bose & Co.: Solicitors for the Defendants.

S.G.P.

Suit dismissed with costs.

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*Before Mr. Justice Renupada Mukherjee and
Mr. Justice R. P. Mookerjee.*

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Contract—Contract to lease out immovable properties—Specific performance—Ingredients of a concluded contract—Contract dependent upon approval of lessor's title, not a concluded contract—Such a contract is not a concluded contract and cannot be specifically enforced—Section 25 of the Specific Relief Act.

Contract—Contract to lease out on "usual terms"—"Usual terms" undefined—Such a contract, is not a concluded contract.

* F. A. No. 90 of 1948, against the decree of Uma Das Gupta, Esq., Additional Sub-Judge, and Court of Zillah 24 Parganas, at Alipore Title Suit No. 57 of 1947 and 32 of 1945, dated the 24th of February 1948.

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Under Section 25 of the Specific Relief Act, a lessor is bound to give the lessee a title free from reasonable doubt, and where a prospective lessee demands title deeds from the prospective lessor for his investigation and approval, it cannot be said that there has been a final and concluded agreement between the parties, although most other material terms may have been agreed upon by them. In such a case the lessee is free to back out of the contract if he is not satisfied about the lessor's title and so long as one party is left free to back out of a contract at his choice, it cannot be held that there was a binding and concluded contract between the parties.

"Usual terms" are very variable phenomena, differing materially not only on the nature of the contract, but also according to the size, situation and value of the properties which are the subject matter of the contract.

One test for determining whether the agreement of parties on usual terms may be dispensed with or not is whether a conveyancer would be able to work up a complete lease from the terms agreed upon between the parties and supply the "usual terms" from the general law of the land and from the customary rules of drafting in such a manner as to preclude the possibility of any reasonable objection by either party. If there are matters which cannot be properly or effectively dealt with in the final deed simply by reference to the general law, then the agreement "on usual" terms cannot be held to be a concluded contract.

Appeal by the Plaintiff.

Suit for Specific Performance of a contract to lease out certain immovable properties. Defence pleads absence of any concluded contract.

The material facts will appear from the judgment.

Atul Chandra Gupta and Shyamadas Bhattacharjee for the Appellant.

Shyama Charan Mitter for the Respondent.

The judgment of the Court was as follows:—

Renupada Mukherjee, J.:—This is an appeal by the plaintiff, and it arises out of a suit for specific performance of a contract to lease out certain immovable properties described in the schedule of the plaint by the defendant in favour of the plaintiff. The suit was contested in the Trial Court by the defendant, and dismissed, and so the plaintiff has preferred this appeal. The facts of the case will appear from the body of the judgment.

Before coming to the matters which are really in controversy between the parties, it will be useful to set out the following fact about which there is no dispute. Defendant Khetra Hari Sarkar, since deceased, was the owner of municipal premises Nos. 12, 13, 14 and 15, Chingrihatta Lane, within Police Station Belighata in the close suburbs of Calcutta. These premises comprise an area of about 20 bighas of land with a two storied building upon a portion. The rest of the land comprises mainly vacant land with three tanks and some tin roofed structures near the entrance gate. For reasons known to himself and not disclosed by evidence defendant Khetra Hari wanted to give a long term of lease of the premises on suitable terms, and for this purpose he engaged the service of one Gopeswar Mallik, an estate and house agent. On the 13th December, 1944, the defendant gave a letter of authority to Gopeswar (Exhibit 7(a)) empowering him to secure a lessee of the above premises for a term of 81 years at a rent of Rs. 300/- per month and *selami* of Rs. 30,000/-. The remuneration of the broker was fixed at Rs. 8,000/-, and the letter of authority was to remain valid for a period of seven days from the date of issue. Plaintiff Baijnath Bajoria is a businessman having a large scale business in motor transport and also owning an agency under the Civil Supplies Department for storage of food grains. He required a large plot of land in the vicinity of Calcutta for business purposes, and he was also in communication with broker Gopeswar Mallik. Gopeswar communicated the terms of Khetra Hari to the plaintiff on the 13th December, 1944, and they together inspected the premises in question on the same day at noon. The parties part company at this stage. It is the case of the plaintiff that the main terms of the lease were verbally settled direct between the parties on this day, and the case of the defendant is that beyond an inspection of the locality by the plaintiff and some rambling discussion on some of the terms of the lease no concluded agreement took place between the parties about the proposed lease. The defendant further contended that the negotiations for the lease took place only with regard to twelve bighas of vacant land from out of the four premises in question and not with regard to the premises in their entirety as alleged by the plaintiff. These contentions of the defendant will be dealt with in their appropriate place in the judgment.

To proceed now with the undisputed facts of the case.

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The solicitors of the plaintiff, wrote a letter to the defendant on the 14th December, 1944 (exhibit A) embodying certain terms of a contract of lease said to have been concluded between the plaintiff and the defendant on the previous day and requiring the defendant to send his documents of title for investigation pursuant to one of the terms of the alleged agreement. This letter reached defendant Kshetra Hari on the 20th December, 1944, and his solicitor Sarojendra Kumar Dutt sent a reply on the 2nd January, 1945 [exhibit 1(a)] denying on behalf of his client that there was any concluded contract between the parties and pointing out in particular that there was no agreement over some of the terms set forth in the letter of plaintiff's solicitor. After this there was some more correspondence between the solicitors of the parties until the defendant's solicitor finally repudiated the plaintiff's claim by a letter dated the 27th January, 1945 [exhibit A(7)]. Thereafter the plaintiff instituted this suit on the 7th March, 1945, for specific performance of the alleged contract. Defendant Kshetra Hari died during the pendency of the appeal in this Court and his heirs consisting of three sons and widow were substituted in his place as respondents. The only point requiring decision in this appeal is:

Was there any concluded contract between the parties that Kshetra Hari Sarkar would lease out the disputed property to the plaintiff on the terms and conditions set forth in the plaint? Is the alleged contract specifically enforceable?

Before dealing with the question as to whether there was any concluded contract of lease between the parties it will be useful to consider first whether the defendant intended to lease out the four municipal premises mentioned above in their entirety as alleged by the plaintiff or only 12 bighas of vacant land after excluding his residential house with its appurtenant lands and some tenanted lands. If the contention of the respondents on this issue succeeds, then the main plank of the appellant's case would be gone, and his suit should be dismissed straightaway. The finding of the Trial Court on this point is in favour of the plaintiff, it being held that Kshetra Hari Intended to lease out the four municipal premises Nos. 12, 13, 14 and 15 in their entirety without any reservation or exclusion. This finding is

supported not only by unimpeachable documentary evidence which came into existence prior to the institution of the suit, but also by the very written statement filed on behalf of Kshetra Hari. I may refer to these documents one by one.

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The first document in order of chronological sequence is exhibit 7(a), an admitted letter of authority given by Kshetra Hari to Gopeswar on the 13th December, 1944. The plaintiff also produced another letter of authority (exhibit 7) the genuineness whereof was questioned by the defendant. For the present I shall deal only with the admitted letter of authority. I may refer to the following portion of this letter which is material for the point under consideration:

"To

Messrs. B. Mallik & Co.,
32, Amherst Row, Calcutta.

Dear Sir,

Re:—12, 13, 14 and 15, Chingrihatta Lane.

I hereby authorise you to secure a lessee of my above premises for lease of 81 years at a rent of Rs. 300/- per month with *Selami* of Rs. 30,000 only."

Premises Nos. 12, 13, 14 and 15 are mentioned here without any curtailment or reservation. The draft of this letter of authority was prepared by Gopeswar. The defendant's suggestion was that this draft was prepared by Gopeswar with some ulterior motive and he mentioned the four municipal premises in their entirety against the desire of Kshetra Hari. I may, however, mention that the fair copy of the letter was prepared from the draft by Kshetra Hari's son Bimal. There is, therefore, no reason to think that Gopeswar played the defendant false. It is an admitted fact that some talk took place between the parties direct on the 13th December, 1944, about the proposed lease. The plaintiff's solicitor Charu Chandra Basu sent a letter next day to the defendant embodying the main terms of the alleged contract. I shall have to deal with this letter in greater detail in a subsequent portion of the judgment. For the pur-

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pose of deciding the point I am now dealing with, I may mention that the following is the heading of the letter:

"Re:—Lease of premises Nos. 12, 13, 14 and 15
Chingrighatta Lane, Calcutta.

This heading of the letter marked exhibit a coupled with term (5) of this letter wherein the defendant is said to have agreed to give up vacant possession of the "entire premises" leaves no room for doubt that the plaintiff was wanting a lease of the four premises in their entirety. This letter was received by the defendant on the 20th December, 1944, and his solicitor Sarojendra Kumar Dutt gave a reply on behalf of his client on the 2nd January, 1945 [(Vide exhibit 1(a))]. A perusal of the letter of defendant's solicitor shows that the contract alleged by the plaintiff was challenged on the ground that there was no agreement on some material terms set forth in the letter of plaintiff's solicitor. Strangely enough although the reply by defendant's solicitor was given in a leisurely fashion, it omitted to state that there was an initial and fundamental difference between the parties regarding the subject matter of the contract. Kshetra Hari filed in his defence on the 1st May 1945, and he also filed an additional written statement on the 4th June, 1946. There is not a whisper of the above contention in any of these documents; rather from paragraphs 5 and 7 of the original written statement it would appear that the defendant was well aware that the plaintiff was asking for lease of the entire premises, but the defendant had intimated to him that it would not be possible for him to deliver vacant possession within the time demanded by the plaintiff, viz. the 31st December, 1944 on account of the existence of his residential house and also of some tenants and a Deity in a portion of the land. The defendant never made a case that he had intended from the very outset to give lease of 12 bighas of vacant land only, and so the question of giving vacant possession of the entire premises did not arise. It seems to me that this case was made by the defendant on the spur of the moment at the time of the hearing of the suit in the Trial Court, and so in agreement with the findings of the Trial Court I reject this contention of the defendant and hold that both parties knew and intended from the

beginning that if any lease was to be given and taken, it would be in respect of the entire premises Nos. 12, 13, 14 and 15, Chingrihatta Lane, without any curtailment.

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I next deal with the question whether there was a concluded and complete contract between the parties, and whether Kshetra Hari agreed to lease out the premises in question to the plaintiff on the terms and conditions set forth the plaint. This brings me to a consideration of the two letters of authority purporting to have been given by Kshetra Hari to Gopeswar on the 13th December, 1944. They were marked exhibits 7 and 7(a) in the Trial Court.

Exhibit 7 runs in the following terms:—

“To

Messrs. B. Mullick & Co.,

32, Amherst Row, Calcutta.

I do hereby agree to lease but my Garden House with land measuring about 20 bighas and with 2 storied building numbered 12, 13, 14 and 15 Chingrihatta Lane, for a period of 81 years at the rent of Rs. 300/- per month and *Selami* of Rs. 30,000/- Rupees Thirty thousand only. Municipal Taxes Revenues and all municipal requisitions to be borne by you. This letter of authority will hold good for 7 days only.

Sd/- Kshetra Hari Sarkar.”

Exhibit 7(a) is also quoted below:

“To

Mrs. B. Mallik & Co.,

32, Amherst Row, Calcutta.

Dear Sirs,

Re:—12, 13, 14 and 15, Chingrihatta Lane, Calcutta. I hereby authorise you to secure a lessee of my above premises for lease of 81 years at a rent of Rs. 300/- per month with *Salami* of Rs. 30,000/- only. I undertake to pay you as remuneration of Rs. 8,000 only in lump sum for the transaction on the registration of the lease. This letter of authority will remain valid for 7 days from date.

Sd/- Kshetra Hari Sarkar.”

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It is an admitted fact that the broker met the defendant on several occasions prior to the 13th December, 1944, in connection with this transaction:

Before Gopeswar Mullick (plaintiff's witness No. 5) stated in his evidence that he met the defendant on the 12th December, when the letter gave his final terms, and after these terms were conveyed to the plaintiff he asked Mullick to bring a letter of authority from the defendant which he did bring on the following day. The broker further states in his evidence that exhibit 7 is that letter of authority. The evidence of the broker further is that after this letter was brought the plaintiff and his son Rameswar visited the locale in company with the broker and the contract was verbally concluded then and there between the parties by mutual discussion. Mullick also stated in his evidence that he again went to the defendant alone on the afternoon of the same day and obtained another letter of authority [exhibit 7 (a)] containing the amount of his remuneration together with some tax bills and a copy of a plan of the premises.

The defence case is that the broker had talk with defendant's son Anil on the 12th December, and that only one letter of authority together with the plan and tax bills was made over to him on the morning of the 13th December. That the broker again paid a visit to the defendant on the afternoon of the 13th December, was denied by him. Exhibit 7 is impugned by the defendant as a false and forged document manufactured for the purpose of this suit. It is immaterial for our purposes whether the broker saw only Anil or Anil and his father on the 12th December, but it is important for our purposes to find out which letter or letters of authority are made over by the defendant to the broker on the 13th December. The admitted evidence shows that the broker himself prepared a draft (exhibit B) of the letter of authority marked exhibit 7(a) which was fair copied by defendant's son Bimal. I find that the body of the whole of exhibit 7 is in the handwriting of the broker. He deposes that Kshetra Hari has signed this document. Some genuine signatures of Kshetra Hari were compared with the disputed signature in exhibit 7 by handwriting expert Sridhar

Chatterjee (defendant's witness No. 6) in whose opinion the writer of the Specimen signatures was not the writer of the signature in exhibit 7. The expert gave reasons in support of his conclusion. The Trial Court accepted evidence and came to the finding upon a consideration not only of the evidence of the expert, but also of other relevant evidence and the circumstances of the case, that exhibit 7 was not signed by the defendant and was not a genuine document. This finding of the Trial Court could not be successfully challenged by Mr. Gupta appearing on behalf of the appellant, and agreeing with the Trial Court I hold that the defendant gave one and only one letter of authority to the plaintiff which was marked exhibit 7(a) in the Trial Court and that exhibit 7 was manufactured for the purpose of this suit. Defendant apparently gave exhibit 7(a) to the broker on the morning of the 13th December, along with the plan and the tax bills, and no further document was given to the broker on the afternoon of that day as was deposed to by him.

The next important question is how far the plaintiff is responsible for the certain of this false and forged letter of authority. It may no doubt be urged on his behalf that after obtaining a genuine letter of authority from the defendant, broker Mullick manufactured another letter for making it over to the plaintiff, because he was anxious to keep out from the knowledge of the plaintiff that the defendant had offered him quite a handsome remuneration in the event of successful termination of the negotiations. I do not, however, think that the plaintiff can totally evade his responsibility for this deed in this way.

The plaintiff (plaintiff's witness No. 3) admitted that he got exhibit 7 from the broker on the 13th December, 1944, before proceeding to the locale. It is very unlikely that the broker would have taken into his head to manufacture a letter of authority directly after having received a genuine one from the defendant. Then again although exhibit 7(a) is in conformity with the true form of a letter of authority, exhibit 7 is drafted in the form of an agreement executed by the defendant, and the mentioning of the exact area and of the building has been made in such a manner as to suit the case of the plaintiff. The clause

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as to payment of municipal taxes *et cetera* also seems to be an improvement upon exhibit 7(a). Such the form of exhibit 7(a) only for the benefit of the plaintiff, and this improvement could not have emanated at the instance of the broker only. It is also significant that the plaintiff at first filed in Court only a typed copy of this so-called letter of authority, but the original was produced in Court upon a requisition for production being made by the defendant on the 7th June, 1946 (vide order No. 20, dated the 7th June, 1946). On a consideration of all these facts and circumstances I am of opinion that the false letter of authority marked exhibit 7 must have been brought into existence for the benefit of the plaintiff and with his knowledge.

I now turn to the proceedings which took place between the parties on the 13th December, 1944. Admittedly there was a meeting between plaintiff Baijnath and deceased defendant Kshetra Hari in the disputed premises on that day and here were also some discussions about the proposed lease between the parties. According to the plaintiff, the discussions culminated in a final and concluded contract the material terms whereof were mutually agreed upon by both the parties. The terms were not reduced to writing. That the plaintiff, however, felt the necessity of some document in writing can admit of no doubt, because he went to the locality to discuss about the lease only after having obtained a written letter of authority from the defendant. The following lines from the deposition of the plaintiff are also signature:

"There was nothing to prevent us putting down the terms of our agreement in writing then and there except that I wanted to have it done through a solicitor."

It is, therefore, clear from the testimony of the plaintiff that they wanted the terms of the contract to be finalised in writing through his solicitor. Accordingly the plaintiff sent a solicitor's letter to the defendant which may be described as a letter of confirmation. This letter purports to embody the material terms of the agreement and so it is reproduced verbatim here:

9, Old Post Office St.,

Calcutta, 14th December, 1944.

Charu Chander Bose,

Solicitors,

Notary Public

Phone: Cal. 1904

Tel. Address: LEGACY

Khetra Hari Sirkar, Esq.,

14, Chingrighatta Lane,

Calcutta.

Dear Sir,

Re:—Lease of Premises Nos. 12, 13, 14 and

15, Chingrighatta Lane, Calcutta.

On the 13th instant you authorised Messrs. B. Mullick & Co., House and Land Agents, to negotiate a Lease of the above premises.

Pursuant to such authority Mr. G. Mullick of Messrs. B. Mullick & Co., approached our client Mr. Baijnath Bajoria, M.L.A. (Central), and induced him to obtain a lease.

Our client thereafter accompanied by his son Mr. Rameswar Bajoria and the said Mr. G. Mullick called on you yesterday. The following terms were discussed and definitely agreed upon:—

1. The period of the lease will be 81 years commencing from the 1st of January, 1945.

2. Our client will pay a monthly rent of Rs. 300/- to be paid by the 7th of each succeeding month.

3. Our client will pay a *Selami* of Rs. 30,000/- at the time of execution of the Lease.

4. Our client will pay both owner's and occupiers' shares of Municipal Taxes payable in respect of the said premises and will also comply with all Municipal requisitions.

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5. You will give vacant possession of the entire premises to our client on, or before the 31st December, 1944, or before the execution of the Lease, whichever is earlier.

6. Our client will have the right to cut trees, excavate and fill up tanks and sink Tube Wells as may be required by him from time to time.

7. Our client will be at liberty to sublet a part or the entirety of the premises for any period without any reference to you. Our client will, of course, be responsible to you for payment of the full rent.

8. The Lease will contain all other usual clauses which are usually contained in a Lease of this nature and the Lease will be prepared at the cost and expenses of your client.

9. You will make out a good title to the property free from all encumbrances, attachments and *lispendens*.

It was also arranged that you would make over the Municipal Rate Bills and a Plan of the property yesterday and you requested Mr. Mullick, to see you in the afternoon. Pursuant to such request Mr. Mullick called on you and you made over the Municipal Rate Bills and the Plan to him.

We shall now thank you to send us the documents of title herein for our investigation and oblige.

Yours truly,
Charu Chandra Bose."

This letter sets forth nine terms of agreement said to have been discussed and concluded between the parties. Without coming to a definite finding whether all these nine terms and really been agreed upon between the parties, I may pronounce at the very outset, that taking the letter at its face value, the plaintiff has failed to make out a case of concluded contract. Term No. 9 of the alleged letter coupled with the concluding

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sentence of the letter states that the defendant had agreed to make out a good title to the property free from all encumbrances, attachments and *lis pendens*. In the concluding sentence of the letter the defendant was requested to send the documents of title to plaintiff's solicitor for his investigation. In the deposition, the plaintiff has enumerated in detail the terms on which there was the alleged agreement between the parties. As to documents of title, it is stated that he asked the broker to bring a copy of the plan of the premises and the municipal tax bills from the defendant to satisfy the plaintiff that the defendant was the owner of the premises. According to the evidence of the plaintiff as well as of the broker, these documents were brought by the broker on the afternoon of the 13th December. According to the defendant, they had been made over to the broker earlier in the day together with the admitted letter of authority marked exhibit 7(a). Be that as it may, the plan and the tax bills were in plaintiff's hand when his solicitor's letter was written on the next day. Apparently, the plaintiff was not satisfied that these documents constituted complete proof of defendant's title, and so the defendant was required to make out a good title and to send his title deeds for plaintiff's investigation, although in his oral evidence the plaintiff does not say that any such term was agreed upon between the parties.

Under section 25 of the Specific Relief Act, a lessor is bound to give the lessee a title free from reasonable doubt, and where a prospective lessee demands title deeds from the prospective lessor for his investigation and approval, it cannot be said that there has been a final and concluded agreement between them, although most other material terms may have been agreed upon by them. In such a case the lessee is free to back out of the contract if he is not satisfied about the lessor's title and so long as one party is left free to back out of a contract at his choice, it cannot be said that any binding contract has been arrived at between the parties.

Mr. Mitter appearing on behalf of the respondents referred in this connection to a case reported in *Koylash Chunder Dass v. Tarney Churan Singha* (1). It was a case for specific performance of a contract of sale at the instance of the

(1) (1884) I.L.R. 10 Calc. 588.

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 ——— disallowed, because there was no settlement between the parties
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In the present case, although the plaintiff failed to prove in his oral evidence that the defendant had agreed to make out a good title to the property and although he made a case that all material terms were agreed upon between the parties on the 13th December, yet on the very next day he required the defendant by his Solicitor's letter to make out a good title to the property and to produce documents of title for the investigation of plaintiff's solicitor. This shows that the deal was not closed as has been deposed to by the broker, but the contract was kept dependant on the approval of defendant's title by the plaintiff. Under these circumstances, it cannot be said that there was any concluded and binding contract between the parties on the 13th December, 1944.

Mr. Gupta on behalf of the appellant contends that his client is not insisting upon proof of defendant's title and is ready to take the property with such title as the defendant has got.

In other words, the plaintiff is waiving his right of investigation defendant's title. But subsequent waiver of any of his rights by the plaintiff cannot afford any criterion for determining whether there was a binding contract between himself and the defendant at the date of the alleged contract. The true test for determining whether there was such a binding contract is whether the parties were of one mind on all material terms of the contract at the time it is said to have been finalised between them and whether they intended that the matter was closed and concluded between them.

The following observations of Sri Asutosh Mookerjee, J. In *J. I. J. Hyam v. M. E. Gubbay* (1), may be quoted :

"From these expressions of judicial opinion, it is clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signi-

(1) (1915) 20 Q.W.N. 66.

... if such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed." (page 96-97 of the report).

In the present case, the plaintiff himself intended that no final lease could be made between the parties until the defendant made out a good title to the plaintiff and until it had been approved by plaintiff's solicitor after investigation. Then again there is no statement in the letter marked exhibit A that any contract for lease was concluded between the parties. The letter merely says that "some terms" were discussed and definitely agreed upon between the parties. Of course it is stated in the letter that pursuant to his letter of authority Mr. G. Mallick had induced the plaintiff to obtain a lease of the premises in question. It, however, goes without saying that Gopeswar Mullick who was acting merely as a commission agent for procuring a lessee had no authority to enter into any contract of lease with the plaintiff. Vide *Durga Charan Mitra v. Rajendra Narayan Singh* (1). In the absence of any definite statement in exhibit 7(a) that a contract of lease had been concluded between the parties by mutual agreement and in view of the insertion of term (9) coupled with the concluding sentence of the letter "I am of opinion that there was not binding or concluded contract between the parties on the 13th December, 1944."

A consideration of one or two other terms of the above letter will also lead to the same conclusion. For instance, I may refer to term (8) of the letter of confirmation. This term runs as follows:

"The lease will contain all other usual clauses which are usually contained in a Lease of this nature and the Lease will be prepared at the cost and expenses of our client."

(1) (1922) 36 C.L.J. 467.

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The Trial Court has practically refused to believe the plaintiff's story that there was an agreement between the parties that the lease would contain all other usual clauses which are usually contained in a lease of this nature. I have carefully examined the evidence of the plaintiff and the broker on this point, and I find that the evidence of both the witnesses is totally silent about such an agreement. Kshetra Hari denies that there was such an agreement, and he says that he does not even understand what is meant by usual terms. Having regard to the evidence on record, I am definitely of opinion that there was no agreement between the parties that the lease would contain all usual terms which are generally incorporated in leases of this description. Mr. Gupta on behalf of the appellant argued that even if there was no such express agreement between the parties, the material terms having been agreed upon, other subsidiary and non-essential terms would be incorporated in accordance with the general principles governing such leases. In support of his contention Mr. Gupta cited a case reported in *Jaykanta Lahiri Choudhuri v. Kailash Chandra Bhowmick* (2). In that case the defendant in a suit for specific performance of a contract for grant of *putni* lease raised, among others, an objection that there was no agreement between the parties as to by what instalment rent should be paid and at what rate interest should be paid on arrears of rent. This objection was overruled on the ground that in the absence of an agreement on such matters they should be governed by the tenancy law of the country.

Now, "usual terms" are very variable phenomena, differing materially not only according to the nature of the contract, but also according to the size, situation and value of the properties which are the subject matter of the contract. Thus the usual terms of a contract for sale must necessarily be widely different from the usual terms of a contract for lease. Then again the usual terms of a short-term lease or lease of a small property must vary from the usual terms of a long term lease, or a lease of a big property. In the case cited by Mr. Gupta, the usual terms of the *putni* lease could be fully supplied by the general tenancy law of the land. Can the same thing be said with reference to the lease with which we are concerned? My answer must be in the negative. One test for determining whether the agreement

(2) (1919) 23 C.W.N. 563

532 (1919) 23 C.W.N. 563

of parties on usual terms may be dispensed with or not is whether a conveyancer would be able to work up a complete lease from the terms agreed upon between the parties and supply the "usual terms" from the general law of the land and from the customary rules of drafting in such a manner as to preclude the possibility of any reasonable objection by either party. In my judgment, it is not possible to prepare such a complete and final lease from the terms enumerated in the letter marked exhibit A. There are some gaps and omissions which cannot be supplied from the general law governing leases. For instance, the Trial Court has found that there are two tenants on the land one Francis Vianest, a hide merchant, having a right to dry up hides on a portion of six bighas of vacant land, and another Sukhan Mistry possessing some 8½ cottas of land. This fact was not brought to the notice of the plaintiff and there was admittedly no agreement as to what consequence would follow if the lessor failed to deliver vacant possession of the entire premises including the tenanted land. There was no agreement between the parties as to whether the plaintiff would give any security for regular payment of rent, or at what rate interest would run on arrears of rent. There was also no agreement as to the proportion on which compensation would be apportioned between the parties in case of compulsory acquisition of the leasehold premises. Nothing was also said or agreed upon about the repairs of the existing building. These are matters which could not be properly or effectively dealt with in the final lease simply by a reference to the general law governing leases. The plaintiff felt this difficulty and so falsely enough his solicitor wrote in the letter of confirmation that there was an agreement that the lease would contain all other usual terms, although in fact there had been none. Thus the plaintiff considered such a term to be a vital term of the agreement. As there was no such agreement, the contract was not complete and the suit must fail for that reason as well.

A consideration of term (5) of exhibit A will also lead to the same result. This term as follows:—

"You will give vacant possession of the entire premises to our client on or before the 31st December, 1944, or before the execution of the Lease whichever is earlier."

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The defendant's case is that there were two tenants on the land one, Francis Vianest, a hide merchant, occupying six bighas of vacant land for drying up hides, and another man Sukhan Mistry, occupying 8½ cottas of land by erection of structures. It is also the case of the defendant that he has got his two-storeyed residential house on the land and also a family Deity, viz., Deity Annapurna is installed in a hut near the gate. The defendant, therefore, contend that it was not possible for him to make over vacant possession to the plaintiff within the short time mentioned in the letter. Indeed the defendant made a case that the negotiations for the lease took place in respect of twelve bighas of land excluding the building, the hut of the Deity and the tenanted lands. That story has been found to be false both by the Trial Court and myself.

Mr. Gupta strenuously contended that the specific case made by the defendant having been found to be false, the case made by the plaintiff should be believed as it is consistent with the admitted letter of authority [Exhibit 7(a)] issued by Kshetra Hari to the broker. I am not impressed by this argument, because exhibit 7(a) sets forth the terms of the proposed lease in a very skeleton form, and it is for the plaintiff to prove affirmatively that all the material terms of the lease were agreed upon between the parties. I am prepared to believe the plaintiff that Kshetra Hari did not mention the existence of the tenants at the time of the negotiations and that the plaintiff undertook to conduct the sheba and *puja* of the Deity if the lease was given and if the Deity was not removed. The evidence of plaintiff's own witness Gopeswar Mullick (plaintiff's witness No. 5) demolishes the case of the plaintiff that the defendant had agreed to give vacant possession of the entire premises on or before the 31st December, 1944 or before the execution of the lease whichever was earlier. The broker stated in his examination in chief that when the talk of lease was going on between the parties, the defendant stated that he would find a house and then leave the house on the disputed premises and he might take three or four or five months for shifting. This being the evidence of plaintiff's own witness, I hold that there was no agreement between the parties as regard term (5) of exhibit A. That being so, it cannot be said that there was a complete

agreement between the parties on all the essential terms of the contract.

From the foregoing findings, it would be sufficiently clear that there was no such contract between the parties as is capable of being specifically enforced and so the suit has been the rightly dismissed by the Trial Court.

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Before parting with the case, I shall consider one other ground which has been held to be sufficient by the Trial Court for the dismissal of the suit. It would appear from the concluding portion of the judgment of the Trial Court that that Court would have refused to enforce the contract on the ground of hardship even if the plaintiff had succeeded in making out a case of concluded contract. I am not inclined to agree with this view taken by the Trial Court. According to that Court the performance of the Contract would involve serious hardship on the defendant as he would have to vacate his own house and it would not be possible from him to secure another house within a reasonable rent. In my judgment, the Trial Court has not properly appreciated the question of hardship. If the claim of the plaintiff were otherwise tenable I would not have rejected it simply on the ground of hardship to the defendant, because he negotiated a lease of the entire premises, including the building, with eyes open and knowing fully the consequences of such a lease and the hardship was one which must have been foreseen by him before carrying on the negotiations.

In the result, the appeal fails. It is accordingly dismissed with costs.

R. P. Mookerjee, J.:—I agree.

S.G.P.

Appeal dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice P. N. Mookerjee.

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HILLOL KUMAR GUPTA & ORS.*

June, 21.

West Bengal Premises Rent Control Act, 1950, (Act XVII of 1950), Section 14(1), (3) & (4)—Scope of Courts' jurisdiction to strike off defence—Whether his in suits for ejectment on ground of default alone or in composite suits covering other grounds—Order under—Whether can be re-opened at the appellate stage—Section 105(1) of the Code of Civil Procedure.

Section 14 properly constructed can bear only one interpretation, viz. that it covers only suits for ejectment of one particular type viz., suits in which the only ground for ejectment is default in the payment of rent.

The word 'suit' referred to in Sub-Section (3) is obviously the 'suit' mentioned in Sub-Section (1).

Sub-Section (1) of Section 14 read with Sub-Section (3) can be interpreted as covering suits for ejectment only on the ground of default in the payment of rent, or as it is usually called "on the ground of default" alone. Hence, Court's jurisdiction to strike off defence in an ejectment suit is only in a suit on the ground of default and not in a composite suit covering other grounds than the default in the payment of rent.

When the parties agreed that there were no arrears and that the future rents would be deposited within the 15th of the next following month or that, in default of such deposit, the written statement would be struck off, and the court recorded the order based on that agreement.

Held, it was really an order by the court in the exercise of its statutory powers under Section 14(4) of the Rent Control Act of 1950 and not a consent order so much so that its effect could be given effect apart from Section 14(4) of the Rent Control Act.

Section 14 (4) creates certain rights and obligations between the parties to the suit, viz., the landlord and the tenant, but nonetheless, the order which the court passes is an order under the Code of Civil Pro-

* Appeal from Appellate Decree against the decree of Sri S. C. Talukdar, Subordinate Judge, 3rd Additional Court, 24-Parganas, dated the 3rd August, 1953, reversing the decree of Sri S. C. Sen Gupta, Munsif, 1st Court, Sealdah, dated the 9th December, 1952.

cedure according to which suits for ejectment, like other suits, are tried by the Civil Courts.—Hence, under Section 105(1) of the Code of Civil Procedure, the order is open to challenge in an appeal from the decree.

Obiter dicta of a Full Bench decision are entitled to the highest respect.

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Moulvi Miah v. Sashanka Mohon Guha (1) followed.

T. S. R. Sarma v. Nagendro Bala Debi Chowdhurani (2) relied on—

Janab. Ujir Ali v. Sasanka Mohon Guha (3) unreported explained;

R. M. A. R. A. Adaikappa Ghittiar v. R. Chandra Sekhara Thevar alias *Sundra Pandya Thevar* (4) applied; and *Jyotindra Nath Mitra v. Sourindra Nath Dutta* (5) referred to—

The material facts will appear from the judgment.

Hemendra Chandra Sen, Radhika Charan Chatterjee for the Appellant.

Mahendra Kumar Ghose, Kshitish Chandra Basu for the Respondents.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.—The appeal is by the Plaintiff and it arises out of a suit for ejectment which was decreed by the trial Court after striking out the defence to the Plaintiff's claim for ejectment under Section 14(4) of the Rent Control Act of 1950; but which decision has been set aside on appeal and the case remanded for hearing on the merits. The learned Subordinate Judge who heard the tenants appeal from the trial Court's decree for ejectment has held that the tenants' defence to the Plaintiffs claim for ejectment was improperly rejected by the trial Court under Section 14(4) of the Rent Control Act of 1950; which, according to the learned Subordinate Judge, had no application to the present case. In this view of the matter, the decree for ejectment, passed by the trial Court, has been set aside and the

(1) (1953) 91 C.L.J. 131

(2) (1952) 91 C.L.J. (F.B.) 188; 57 C.W.N. 1 (F.B.).

(3) Civil Revision Case No. 1436 of 1952 decided by Chakravortti, C.J. & Sinha, J. on 15-12-53 (unreported).

(4) (1947) 174 I.A. 264; 52 C.W.N. 275.

(5) (1950) 55 C.W.N. 123.

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suit has been remanded to the Original Court for fresh hearing according to law after giving an opportunity to the defendants to contest the Plaintiff's claim. From this appellate decision the present second appeal has been preferred by the Plaintiff.

The relevant facts are not in dispute and they may be shortly stated as follows:

On 4th December, 1951, the present suit for ejectment was filed by the Plaintiff for evicting the defendants from premises No. 49, Motijhil Avenue, Dum Dum. In the suit, ejectment was claimed on the ground of default in the payment of rent and also on other grounds, for example *bona fide* requirement for the Plaintiffs own use and occupation, etc. under the Rent Control Act, 1950. The suit was contested by the defendants who filed their written statement on 24th March, 1952. On 31st March, 1952, the Plaintiff applied for an appropriate order under Section 14(4) of the Rent Control Act, 1950, alleging that the defendants had been making defaults in the payment of rents from October, 1951.

To this there was a rejoinder by the tenant, defendant No. 1 on 10th April, 1952, that only the rent for March 1952 was due. On 12th June, 1952, the Court recorded the following order:

"Both parties ready. Petition under Section 14(4) is taken up for hearing. Heard pleaders of both sides who agree that previous rents having been deposited the rents from June 1952 @ Rs. 100/- per month are to be deposited in this Court.

ORDERED.

That the defendant do deposit future rents in this Court month by month @ Rs. 100/- per month from June, 1952, by the 15th of each of the next following month. In default the defence against ejectment shall be struck off"

The rent for June, 1952 was duly paid, but these were defaults in the payment of subsequent rents and on 14th November,

1952, the defence to the Plaintiff's claim for ejectment was struck off. Thereafter the suit came up for hearing on 9th December, 1952. It was heard ex parte and an ex parte decree for ejectment was passed by the trial Court. The defendant No. 1 appealed from this decree and in the lower Appellate Court the real point that was taken on his behalf was that, having regard to the nature of the plaint the present suit was clearly a composite suit for ejectment on various grounds, including the ground of default, and to such a suit Section 14(4) of the Rent Control Act of 1950, can have no application. This contention was accepted by the lower Appellate Court and the necessary consequence was that the order of the trial Court, striking off the defence to the plaintiff's claim for ejectment under the provisions of that section, was held to be without jurisdiction and accordingly the case was remanded to the trial Court for fresh hearing, as stated above.

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In support of this appeal, Mr. Sen, appearing for the Plaintiff appellant, has raised three contentions.

In the first place, Mr. Sen has contended that the order under Section 14(4) of the Rent Control Act of 1950 passed by the Court in this case on 12th June, 1952, was really a consent order and that, accordingly, it will have full effect, even apart from Section 14(4) of the Rent Control Act. With this argument I am unable to agree. The utmost that can be said from the order, as recorded by the Court, is that the parties agreed that there were no arrears and that the future rents would be deposited by the defendants in Court. The provision, however, in the order, viz. that such future rents will have to be deposited within the 15th of the next following month or that, in default of such deposit, the written statement would be struck off, was not by consent. It was really an order by the Court in the exercise of its statutory powers under Section 14(4) of the Rent Control Act of 1950. In this view of the matter, I reject the first submission of Mr. Sen in support of this appeal.

Mr. Sen next contends that, although the ejectment suit was on the ground of default and on other grounds as well, the Court had ample jurisdiction to strike off the defence under Section 14(4) of the Rent Control Act 1950. In effect, Mr. Sen

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contends that Section 14(4) or, for the matter of that, Section 14 itself, is not confined to suits for ejectment on the ground of default alone, but covers also ejectment suits of a composite character, where the ground of default is mentioned as one of the grounds for ejectment. Mr. Sen is quite alive to the fact that a Division Bench of this Court has expressed the contrary view in the case of *Maulvi Miah v. Sashanko Mohan Guha* (1). But he submits that the said Division Bench has not taken the correct view of the law and, in any event, a different opinion appears to have been expressed by the earlier Division Bench in the case of *Janab, Ujir Ali v. Sashanka Mohan Guha* (2). Mr. Sen also submits that the Full Bench of this Court in *T. S. R. Sarma v. Nagenidra Bala Debi Chowdhurani* (3), did not really decide this question and, accordingly, it cannot be regarded as an authority against his contention, although it was so taken by the Division Bench of this Court in *Maulvi Miah v. Sasanko Mohan Guha* (1).

Having given the matter my best consideration, I am unable to accept Mr. Sen's contention. Apart from all other questions, purely as a matter of construction Section 14 properly constructed, can bear only one interpretation, viz. that it covers only suits for ejectment of one particular type, viz. suits in which the only ground for ejectment is default in the payment of rent. That this is so becomes amply clear and practically incontrovertible when we turn to sub-section (3) of that section. That section provides that if, within the time fixed by the Court, the tenant deposits the sum calculated by it an account of arrears of rent and interest and cost as contemplated in sub-section (1), the suit so far as it is a suit for recovery of possession of the premises shall be dismissed by the Court. The suit, referred to in this sub-section, is obviously the suit mentioned in sub-section (1). It is inconceivable—and, indeed, it seems about (sic) too—that suit, in which there are grounds for ejectment other than the ground of default, will be dismissed merely on deposit of arrears of rent and interest and cost without consideration of the other grounds mentioned by the Plaintiff. In my view, having regard to sub-section (3), sub-section (1) of section 14 can

(1) (1953) 91 C.L.J. 131, 57 C.W.N. 300

(2) Civil Rev. Case No. 1436 of 1952 decided by Chakravarti, C.J. & Sinha, J. on 15.12.53 (unreported).

(3) (1952) 91 C.L.J. (F.B.) 188; 57 C.W.N. 1 (F.B.).

be interpreted as covering suits for ejectment only on the ground of default in the payment of rent, or as it is usually called "on the ground of default," alone. This was also the view taken by the Division Bench of this Court in *Maulavi Miah v. Sashank Mohan Guha* (1), and, as I respectfully agree with that view of the law, I have no hesitation in following the same. I may also add that, in my opinion, the point is really concluded against the appellant by reason of the decision of the Full Bench, *T. S. R. Sarma's Case* (2). But even assuming that it is not, the Appellant's position would not materially improve. There is little doubt that the Full Bench did express an opinion on this point which is counter to Mr. Sen's submission and that expression of opinion cannot be lightly disregarded.

In delivering the majority judgment of the Full Bench, Chakravarti, C.J., made, *inter alia*, of the following observations, very pertinent to the present question, which occur at P. 12 of the report:

"In order to ascertain the true meaning of Section 14(4), it is necessary to read it along with the preceding sub-section. The marginal note to the section is 'when the tenant can get the benefit of protection against eviction' but the section itself provides for protection not in respect of all suits for eviction but only in respect of suits of one particular type. Sub-section (1) with which the section begins is clearly limited to suits in which the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of section 12; that is to say, suits in which the only ground which disentitles the defendant from the protection of the Act is that he has defaulted in the payment of Rent for two months. Suits in which the protection of the Act may be unavailable to the tenant on any of the other grounds mentioned in clauses (a) to (h) of Section 12(1) or on any of those grounds in addition to the ground of default, are not within the ambit of Section 14(1)."

The Full Bench then authoritatively ruled that sub-section (4) of section 14 had reference only to suits contemplated in sub-section (1) of the section, by interpreting the word "the" in the phrase "the Suit" occurring in sub-section (4), as obviously

(1) (1953) 91 C.L.J. 131; 57 C.W.N. 300 (F.B.).

(2) (1952) 91 C.L.J. (F.B.) 188; 57 C.W.N. 111 (F.B.).

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implying a reference back to sub-section (1). The contrary view, appearing in *Jyotindra Nath Mitra v. Sourindra Nath Dutta* (1), was expressly overruled and then followed some further observations which may be usefully quoted here as follows:

“.....Sub-section (1) is not speaking of Suits of ejectment in general.....but speaking of..... one particular type of Suit” namely, “A Suit for recovery of possession in which the landlord would not get a decree for possession but for clause (i) of the proviso to Sub-section (1) of Section 12”

The extracts quoted plainly indicate that the Full Bench accepted that Sub-Section (1) of Section 14 had reference to only one type of ejectment suits, namely, those on the ground of default alone. The Full Bench no doubt recognised that, in suits, contemplated under either of the two Sub-sections (1) and (4), there might also be claims other than the claim for ejectment but what is important is that it expressly held that the only type of ejectment suits which came within the scope or ambit of the said two Sub-Sections, or, for the matter of that, of the entire Section (14), read as a whole,—was a suits on the ground of default alone

In the above view of the matter, I would hold that, on the present question, the Full Bench decision in *T. S. R. Sarma v. Nagendrabala Devi Chowdhurani* (2), is a direct authority against the appellant but, even assuming that the point did not strictly arise before the Full Bench and its observation were merely obiter or in the nature of obiter dicta, they are, even as such obiter dicta, emanation as they do from a Full Bench of this Court, entitled to the highest respect and, as my own view of the law agrees with those observations and with the decision of the Division Bench of this Court in *Moulvi Mian v. Sashanko Mohan Guha* (2). I am bound to overrule the contrary submission of Mr. Sen.

In passing I may add that the other Division Bench decision (Chakravarti C.J. and Sinha J.), to which reference was made by Mr. Sen, viz., in the case of *Tanab Rjir Ali v. Sashanka*

(1) (1950) 55 C.W.N. 123.

(2) (1952) 91 C.L.J. (F.B.) 188; 57 C.W.N. 1 (F.B.).

(2) (1953) 91 C.L.J. 131; 57 C.W.N. 300.

Mohan Guha (1), although it contains some unfortunate observations which might, at first sight, support Mr. Sen's submission, can no longer be relied on as precedent or authority, it having been recalled later on by the learned Judges themselves.

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In *Ujir Ali's case* (1) the original decision was given ex parte in the absence of the tenant petitioner who, thereafter appeared and succeeded in having the same set aside and the Civil Revision case restored to file. The Revision case was eventually heard by Guha Ray, J., and myself and, in our judgment, dated 6th May, 1953, we took the same view of the scope and ambit of section 14 and of the Full Bench Case in *T. S. R. Sarma's Case* (2), as our learned brothers, Lahiri and Guha, JJ. *Moulvi Miah's Case* (3). *Ujir Ali's case* (1), therefore, is really against Mr. Sen's contention and is another authority, or, at least, another precedent, against his client.

I am also reluctant to hold that the learned Chief Justice, who delivered the majority judgment of the Full Bench in *T. S. R. Sarma's Case* (2), and made the observations which I have quoted above, meant to lay down a different law or express a contrary view, while presiding over a Division Bench only a few months later. The observations in *Ujir Ali's case* (1), were certainly not intended to affect the clear expression of opinion on the scope and ambit of Sub-sections (1) and (4) of Section 14 of the Rent Control Act of 1950, as contained in the Full Bench case in *T. S. R. Sarma's Case* (2), and I would not give them such an unreasonable interpretation.

I, accordingly, overrule also the second submission, made by Mr. Sen in support of this appeal.

Lastly it was argued that, as the tenants defendants did not move against the order under Section 14(4), passed on 12th June, 1952, they must be held to have accepted that order and, in any event, they must in law be held bound by that order and

(1) Civil Revision Case No. 1436 of 1952 (unreported) decided by Chakravorti, C.J., & Sinha, J. on 15-12-53.

(2) (1952) 91 C.L.J. 188; 57 C.W.N. 1 (F.B.).

(3) (1953) 91 C.L.J. 131; 57 C.W.N. 300.

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should not be allowed to reopen it, at the appellate stage. There is one short answer to this submission of Mr. Sen. Under Section 105(1) of the Code of Civil Procedure, that order was clearly open to challenge in an appeal from the decree and that is what has been done by the defendants in this case. The argument of Mr. Sen that the said order, dated 12th June, 1952, was not an order under the Code of Civil Procedure and to it Section 105(1) of the Code could not be attracted cannot obviously be accepted. The court trying the ejectment suit was certainly passing its orders and its decree under the code of Civil Procedure, although those orders and the decree had also to comply with the relevant provisions of the Rent Control Act and had to be made in accordance and in conformity with the said provisions too. Section 14(4) no doubt empowers the court to pass the order, contemplated by that provision, and creates certain rights and obligations between the parties to the suit, viz., the landlord and the tenant, but, at the same time, it is clear that the order which the Court passes is an order under the Code of Civil Procedure, according to which suits for ejectment, alike other suits, are tried by the Civil Courts. If authority is needed for this view it is to be found in *R. M. A. R. A. Adaikappa Chettiar v. R. Chandrasekhara Thevar @ Sundra Pandia Thevar* (1), where the basic principle underlying such matters, has been sufficiently discussed and laid down in unequivocal terms. I hold, therefore, that this third submission of Mr. Sen cannot also be accepted.

In the result, all the points, urged in support of this appeal fail and the appeal is dismissed. But, having regard to the circumstances of this case and the nature of the questions involved, I would direct the parties to bear their own costs in this Court.

As the suit for ejectment was instituted as far back as December, 1951, it is desirable that the re-hearing of the suit by the trial Court should be as expeditious as possible and the learned Munsif will take appropriate steps in that behalf.

As the appeal fails on the merits, the alternative application under Section 115 of the Code of Civil Procedure will also fail. It is, accordingly, dismissed, but there will be no order for costs.

S.G.P.

Appeal dismissed.

(1) (1947) 52 C.W.N. 275; 72 I.A. 264.

ORIGINAL CIVIL.

CIVIL.

Before Mr. Justice G. K. Mitter.

1954.

January, 22.

SM. BIMAL KUMARI

ASOKE MITRA & ANR.*

Jurisdiction—Suit for specific performance—Agreement for sale of land outside the original jurisdiction of the Calcutta High Court—The cause of action for a suit for specific performance of an agreement for sale of land whether is the same as the cause of action for possession.

Leave under Order II Rule 2 of the C.P.C. when should be refused—Order XXI Rules 32(5), 35 of C.P.C.

Specific Relief Act Section 16 and 17—Scopes of.

The cause of action for possession on an agreement for sale of land is the same as the cause of action for the specific performance of the said agreement.

If the plaintiff omits to sue for possession in order to get adjudication by a Court and if the Court had any discretion in the matter, in order to avoid multiplicity of proceeding leave should not be given in such a case under Order 2 Rule 2 of C.P.C. to sue for possession.

If a party files a suit in a court which is not competent to grant him one of the reliefs he is entitled to, he cannot be heard to say that that part of the contract is one which cannot be or ought not to be specifically performed. The ability or inability to perform a contract referred to in Section 16 of the Specific Relief Act clearly relates to the parties to the suit and has no connection with the jurisdiction of the Court to grant a particular relief.

The claim to possession forms an integral part of an agreement for sale of land.

If the plaintiff asked the court to give a decree which is not decree for specific performance simpliciter but for possession as well, the rights of the parties cannot be governed by the provision of Order 21 Rule 32 or Order 21 Rule 35. In a case like that the decree of the court have to be drawn up in such a manner that both these rules could be availed of, if necessary.

The obligation to deliver possession is an integral part of the agreement for sale of land and the cause of action for possession is not different from the cause of action for specific performance.

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The material facts will appear from the judgment.

*H. N. Sanyal with B. Das and Amiya K. Basu for the Plaintiff.**I. P. Mukherjee with R. Goho for the Defendant.*G. K. Mitter, J.
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The judgment of the Court was as follows:—

G. K. Mitter, J.:—This is a suit for (a) specific performance of an agreement for sale of a property situate outside the jurisdiction of this Court, (b) leave under Order 2, Rule 2 of the Code of Civil Procedure in respect of possession of the said premises, (c) decree for Rs. 30,000/- with interest thereon at 12 per cent from the 22nd January, 1948 until payment if title be not found good on such enquiry, (d) alternatively, for refund of Rs. 30,000/- with interest at the said rate, and decree for Rs. 10,000/- as compensation, (e) leave under Order 2, Rule 2 of the Code of Civil Procedure in respect of charge on the said property, (f) leave under Clause 12 of the Letters Patent, (g) Receiver, (h) injunction and (i) costs.

The plaintiff is the wife of one Maharaj Bahadur Singh Nahar. The original defendant was one Asoke Mitra who formerly worked as a solicitor of this Court and owned premises No. 43/1, Ramesh Mitra Road, Calcutta, situate outside the jurisdiction of this Court. The suit was filed in 1949. In 1951 the plaint was amended by the addition of a second defendant Surja Kumar Basak, who claims to have purchased the property from the said Asoke Mitra by a conveyance dated the 8th December, 1950 and also seeks to establish title as purchaser of the right, title and interest of Asoke Mitra in the said premises at an auction sale held by the Subordinate Judge, 1st Court, 24-Parganas on the 15th June, 1950.

On the 22nd January, 1948 Asoke Mitra entered into an agreement for sale of the property to the plaintiff for Rs. 60,000/- out of which Rs. 30,000/- was payable forthwith as earnest money and/or part payment of the price, the balance being payable at the time of the completion of the purchase. The vendor covenanted to sell the property free from all en-

encumbrances and subject to the approval of his title by the purchaser's solicitors. The sum of Rs. 30,000/- which was paid by the purchaser to the vendor on the 22nd January, 1948 was to form a first and paramount charge on the said premises and in case the purchase was not completed on any ground whatsoever, it was to carry interest at the rate of 12 per cent per annum. The vendor further covenanted to deliver all documents of title of the said premises within 15 days from the date of the agreement and at his own expense, produce certified copies or abstract of or extract from documents and court proceedings which he might not have in his possession. The vendor was further to make out a good and marketable title at his own cost and the sale was to be completed within four months from the date of the agreement.

Clause 7 of the agreement provides that upon the approval of the title by the purchaser's lawyer, the vendor was to execute and register a proper deed of conveyance in favour of the purchaser or her nominee and the purchaser was to pay the balance of the purchase money on or before the date of the execution of the conveyance, the purchaser being further under an obligation to cause all necessary parties to join in the said conveyance.

Clause 8 of the agreement runs as follows:

"The said premises shall be sold free from all encumbrances and if there be any encumbrances outstanding on the date of the completion of the sale the same shall be cleared and released by the vendor at his own cost and shall pay all outstanding rent, rates and taxes and all outgoings in respect of the said premises upto the date of the completion of sale. Simultaneously with the execution of the conveyance the vendor shall give vacant and peaceful possession of the said premises to the purchaser or her nominee or nominees."

Other clauses are not very material. In the matter of this agreement a pleader practising in the District Court of the 24-Parganas by the name of Ashutosh De was acting for the plaintiff and his signature appears on the agreement for sale as one of the attesting witnesses.

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In the plaint as originally filed the plaintiff, after reciting the above agreement, went on to state in paragraph 4 thereof that although the defendant Asoke Mitter had made over to her some documents of title in or about March, 1949, he failed and neglected to produce the rest of the documents in spite of several requests. Requisitions on title were sent by the plaintiff's solicitors on June 23rd 1949. These, however, were not answered. In paragraph 6 there is an allegation that the plaintiff had always been and still was ready and willing to complete the purchase in accordance with the terms of the agreement. In paragraph 7, the plaintiff asks for leave under Order 11, Rule 2 of Code of Civil Procedure in respect of possession of the premises.

In paragraph 8 of the plaint the plaintiff claim refund of Rs. 30,000/- with interest at 12 per cent from January, 22, 1948, in case the Court did not direct specific performance of the agreement, in which case the plaintiff claims a further sum of Rs. 10,000/- as compensation.

Reliefs (a) and (b) claimed by the plaintiff in the plaint are as follows:

(a) An enquiry whether a good and marketable title can be made to the property comprised in the Agreement in the plaint mentioned; and specific performance of the said Agreement if title be found good on enquiry;

(b) Leave under Order 11, Rule 2 of the Civil Procedure Code in respect of possession of the said premises.

Asoke Mitter the first defendant, filed his written statement herein on November 3, 1949, denying that he had agreed to sell premises No. 43/1, Ramesh Mitter Road to the plaintiff as alleged or at all. He denied further that he had made over any documents of title in respect of the premises to the plaintiff and his case was that the sum of Rs. 30,000/- was given by way of loan on security of the said premises. He further disputed the plaintiff's right to ask for leave under Order 11, Rule 2 of the Code of Civil Procedure.

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which was approved by the defendant No. 1 and in which there was no mention that the property was subject to any agreement. The said draft conveyance was engrossed and stamped and duly executed in the presence of the defendant Basak on December 8, 1950. At the time of the execution of the conveyance there was no mention in it that the conveyance in favour of Basak was subject to any agreement and Basak paid the balance of the consideration money, namely, Rs. 55,000/-.

Basak in his written statement goes on to allege that the said Dasharathi Shome, fraudulently and in collusion with the defendant No. 1, had made an interpolation in the original conveyance to the effect that the transfer was subject to the agreement dated January 22, 1948, of which Basak had no knowledge. After the conveyance in his favour Basak came to know that the said premises had already been purchased by one Gobardhandas Sharma in execution sale held by the first Subordinate Judge, Alipore, in pursuance of a decree obtained by the said G. Sharma in suit No. 160 of 1948 against defendant No. 1. He thereupon acquired the interest of Gobardhandas Sharma under the said decree as also in respect of the said premises by a deed of assignment dated January 29, 1951, for Rs. 6,300/-. The sale of the said premises was confirmed on March 21, 1951, by the Alipore Court and the sale certificate was issued in favour of defendant Basak who was duly substituted in the place of the said Gobardhandas Sharma, and Basak thereafter obtained possession of the premises. By his written statement Basak further denies that the conveyance in his favour, namely, the document dated December 8, 1950, was executed expressly or at all subject to the rights of the plaintiff under the said agreement for sale. He denies that his rights in the said premises are subject to those of the plaintiff under the said agreement for sale or that he was a transferee from the defendant No. 1 with notice of the agreement for sale in favour of the plaintiff or that he was in any way bound by the said agreement or liable to convey the property to the plaintiff. He denies also that he has acquired the said premises with any notice of the said agreement for sale dated January 22, 1948. He disputes the plaintiff's right to obtain leave under Order II, Rule 2 and contends that if the same had already been given, it should be revoked. The defendant took a further plea that this Court has no jurisdiction to try this suit.

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G. K. Mitter, J. in support of his contention mentioned above. He also drew my attention to the judgment of Das J. in the case of *Khatini Bibi v. Lilabati Dassi* (1). In that case, by paragraph 5 of the plaint the plaintiff claimed that the Court would order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in possession of the property. Referring to this paragraph of the plaint Das J. observed that "the agreement itself provides for the purchaser taking possession of the lands. In this view of the matter this suit is not a suit for specific performance simpliciter but it is also a suit for possession of the lands which are outside the jurisdiction of this Court. In so far as it is a suit for possession it is a suit for land according to the meaning I put on that expression and therefore this court has no jurisdiction to entertain this suit." Mr. Das contended that in the instant case possession has been specifically excluded and that the cause of action for possession would only arise after execution of conveyance and the passing of title. In support of this contention he cited the judgment in the case of *Krishnammal v. M. Soundararaja Aiyar* (2). The facts of his case shortly were that the plaintiff having obtained in a previous suit a decree against the defendant for specific performance of an agreement to sell certain immovable property, had got a sale deed in his favour in execution of the decree. He then instituted a suit for the recovery of possession of the lands from the defendants. Both the learned Judges Sankaran Nair and Tyabji JJ. held that such a suit was not barred by the provisions of Order II, Rule 2 and Tyabji J. observed at page 702 of the report "The plaintiff does not now sue for any right under the agreement to convey. In the previous suit he prayed for specific performance of the agreement; both the lower Court have held that in the agreement there was no covenant on which the plaintiff could have sued for possession. Assuming (as was agreed before us) that the agreement gave the right of possession apart from the right to obtain a conveyance, still possession under the agreement could only be for the period prior to the conveyance; after which the purchaser's title would be completed, and he would then be entitled to possession not under the agreement but on the basis of his title." The plaintiff's failure to ask

(1) (1944) 49 C.W.N. 80.

(2) (1913) I.L.R. 38 Mad. 698.

for possession in the previous suit might, therefore, have been fatal to any claim he might have set up in the present case under the agreement." Mr. Das also referred me to a judgment of the Allahabad High Court in the case of *Arjun Singh v. Maharaj Narain* (1), where it was held that "where a person sues another for specific performance of an agreement to sell, and subsequently on the basis of the same agreement, sues for possession, the second suit would be barred by Order 2, Rule 2, but if the subsequent suit is based on the cause of action flowing from the conveyance obtained in pursuance of the decree in the first suit, it will not be barred by Order 2, Rule 2 because the cause of action for the second suit was quite distinct." If it be held that the plaintiff was within his rights not to ask for possession under the agreement, a contention which I shall consider later, and if he expressly excludes his right to possession under the agreement or abandons the said right, this Court would have jurisdiction to try the suit for specific performance. The decision of this issue, therefore, is subject to the decisions on other issues which will follow hereafter.

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On the second issue, it was contended by Mr. Das that Order II, Rule 2 Sub-rule (3) has no application to the facts of this case, it being contended by him that the cause of action for specific performance was different from that of possession. Mr. Mukherjee drew my attention to several judgments including the case of *Krishnammal v. M. Soundararaja Aiyer* (2), and the cases reported in *Rangayya Gounden v. Nanjappa Row* (3), *Nathu v. Budhu* (4), and *Sunder Singh Inder Singh v. Managing Committee S. S. M. S. Rajput High School* (5). If Mr. Das's contention be correct that the cause of action for possession is different from that for specific performance, nothing more need be said. But I find myself unable to accept his contention. The cause of action for possession on the agreement in this case is the same as the cause of action for the specific performance. On the same averments as those made in the plaint in this case the plaintiff would be entitled to ask for

(1) (1950) A.I.R. All. 415

(2) (1913) I.L.R. 38 Mad. 698.

(3) (1901) 28 I.A. 221

(4) (1893) I.L.R. 18 Bom. 537.

(5) (1937) 65 I.A. 106.

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possession also. He need allege nothing further; he need not prove anything more. That this is so would appear from a judgment of Pal J. reported in the case of *Sherali Mirza v. Torapali & ors.* (1). The learned judge observes at p. 519 of Report:

"In my judgement this does not mean that in order to apply Order 2, Rule 2 all the allegations made in the two plaints shall have to be taken and the bar imposed shall apply only when these are identical. The allegations are to be looked into only to find out to what extent they disclose any cause of action. In my opinion, cause of action. In my opinion, cause of action for this purpose would mean all the essential facts constituting the right and its infringement. If the plaintiff obtained a judgement in his favour on a particular cause of action in the previous suit his claim in that suit must be taken to have been based on that cause of action, and that judgment ought to be conclusive as to the cause of action in respect of which that claim was made. In order then to see what is the cause of action in respect of which the claim in the subsequent suit is made and what is the claim made in it we are to look to the plaint in the subsequent suit. If a certain allegation in the plaint discloses the self-same cause of action which could have supported the claim made in the plaint, then, simply because other additional allegations have also been made in it the plaintiff would not thereby escape the bar imposed by Order 2, Rule 2. If without the additional allegations in the second plaint, the cause of action for the claim made in it be complete, then in that case the additional allegations will not constitute the cause of action at all, and the Court after finding that will have to dismiss the claim under Order 2, Rule 2. If the additional allegations go to constitute a fresh cause of action for the claim made, then certainly the cause of action as alleged in the second plaint is different from the cause of action of the first plaint."

(1) (1942) 46 C.W.N. 513 at P. 519.

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If the plaintiff succeeds in this cause and a conveyance is executed in her favour by the defendants or by the Court, in the plaint which will follow in the suit for possession the same allegations would have to be made. On the agreement in suit the plaintiff does not even have to make a demand for possession after the conveyance. Her claim to possession arises simultaneously with the execution of the conveyance. If she was to file a suit to embrace the relief as to possession in the first instance she would only have to state what she has stated in the present plaint and merely add a relief as to possession. The plaintiff in this case has omitted to sue for possession in order to get an adjudication by this Court and if the Court had any discretion in the matter, in order to avoid multiplicity of proceedings, leave should not be given in such a case under Order 2, Rule 2. If something more had to be done under the agreement before the plaintiff could get possession, then the cause of action for the suit for possession might have been different or there might at least have been some ground for the plaintiff not asking for possession; but in this case she seeks to keep the sword hanging on the defendants in respect of her claim to possession merely because she finds it impossible to obtain that relief in this Court. It might have been open to her to give up her right to possession under the agreement and she could have asked for it if and when the document was executed on the strength of that conveyance, but that is not a course which she has chosen to adopt. It may be that in that case there would be other difficulties in her way. However that may be, on the facts of this case I am not prepared to hold that the discretion of the Court should be exercised in favour of the plaintiff in giving leave under Order 2, Rule 2.

On the issue as to readiness and willingness of the plaintiff Mr. Mukherjee contended that there has been great delay in filing the suit and that the plaintiff seems to have taken no steps between January 22, 1948 and March, 1949. Mr. Mukherjee further wanted to rely on the letter dated July 25, 1949 which, in my view, was not proved. Merely proving the signature at the foot of a letter does not prove that the letter was actually sent out and on the facts, as pointed out by Mr. Das, I have no hesitation in coming to the conclusion that such a letter could not have been addressed on the instruction of the plaintiff.

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Undoubtedly there has been some delay in taking steps on the part of the plaintiff between January 22, 1948 and March, 1949, but I see no reason to doubt the genuineness of her husband's explanation that he was busy with his affairs in Pakistan and could not devote much time to this matter and that although he came to Calcutta from time to time and met Asoke Mitter he did not get anything to his satisfaction. To my mind, there could be no doubt that the letter dated July 15, 1949, was never issued under the instruction of the plaintiff. In May 1949 Nahar & Datta entered on the scene on behalf of the plaintiff and they caused various letters to be written to Asoke Mitter in May, June and July 1949. On July 23, 1949, as I have already mentioned Nahar & Datta addressed two letters one to H. P. Dutt & Co., and the other to Asoke Mitter. The letter to H. P. Dutta & Co. repels the idea of their client, namely, the wife of Asoke Mitter having any right in the property and calls upon the said client to deliver the documents of title in her possession to them as solicitors for the plaintiff. The letter to Asoke Mitter reiterates this demand. Nahar & Datta addressed a further letter to Asoke Mitter reminding him that no reply had been received to the letter of the 23rd July. It would be strange conduct on the part of the plaintiff while she was having this matter dealt with by her solicitors Nahar & Datta, to have given instruction to her pleader Asutosh De at the same time to write a letter to Asoke Mitter to the effect that she was willing to give a go-by to the agreement if Asoke Mitter repaid the amount of Rs. 30,000/- with interest.

Maharaj Bahadur Singh stated that it was he who gave instruction to his brother, a partner of Messrs. Nahar & Datta and his wife the plaintiff gave evidence to the effect that she had left everything to her husband. I see no reason to disbelieve this testimony. Clearly a person who was pressing her claim for specific performance in the manner suggested by the letters of the solicitors from May 1949 onwards would never think of causing a letter to be addressed to the vendor through her former pleader Ashutosh De in the way it is suggested in this case. Mr. Mukherjee commented on the fact that Ashutosh De had not been called upon but that is a criticism which could properly be levelled against his client. If it was true that Ashutosh De had written such a letter and the letter was in existence the

easiest thing for the defendant to do in this case would have been to call Ashutosh De and confront him with this letter, a course which has not been adopted by the defendant.

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Mr. Mukherji further contended that his client never had any notice of the agreement for sale and that I should hold that the recital of the agreement for sale in the document of December 1950 in favour of his client was surreptitious and had never come to his knowledge. As I have already pointed out, I am satisfied that there was an interpolation in the conveyance of December 1950 but that, in my opinion make no difference in this case. The agreement for sale was a registered document. The document not merely contained an agreement for sale but it had created a charge in favour of the plaintiff and as such, was a document registrable under the provisions of section 17 of the Indian Registration Act. Mr. Das contended that the defendant Basak must be held to have had notice of this document inasmuch as it was his duty to search the records of the Registration Department for encumbrances and if such searches had been properly made, he would have come across this document of charge which also embraced the agreement for sale. In support of this connection he drew my attention to section 3 of the Transfer of property Act and the explanations to that section. Explanation 1, so far as material for this case, reads as follows:—

"Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration....."

Mr. Das contended that the defendant Basak must be deemed to have notice of the instrument creating the charge and through that of the agreement for sale contained therein. He also relied on explanation III which reads as follows:—

"Explanation III:—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material: Provided that, if the agent

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fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

Mr. Das contended that it must be held that the agent of Basak, namely, Dasarathi Shome, had notice of the agreement for sale and the proviso to explanation III does not help the defendant Basak inasmuch as the plaintiff was not a party to or otherwise cognizant of the fraud. I think there is no answer to this contention and it must be that the defendant Basak, although he had no actual knowledge of the agreement for sale, was affixed with the notice thereof in favour of the plaintiff.

Mr. Das next drew my attention to section 91 of the Indian Trusts Act and contended that the defendant Basak's rights must be held to be subject to the rights of the plaintiff in this case. He referred me to several judgments in support of his contention and I need only mention one case cited by him, namely, the case of *Paparaju Veerara-ghavayya v. Killaru Kamal'Devi & ors.* (1), where it was held that where a purchase is subsequent to the attachment but the agreement, in pursuance of which the purchase is made, is prior to the attachment, the purchase prevails against the attachment. He also referred to me to the judgments reported in *Madan Mohan v. Rebati Mohan* (2), and *Venkata Reddy v. Alappa Chetty* (3).

After the conclusion of the argument in this case it occurred to me that the plaintiff's claim to specific performance as prayed for could not be allowed under the provisions of the Specific Relief Act, namely, Sections 14, 15, 16 and 17 of the Act. I invited further argument on this subject.

Mr. Sanyal leading Mr. Das contended first that the contract, viz., the agreement dated January 22, 1948 was divisible and could be divided into several parts; one of such parts, he argued, related to the charge created in favour of the plaintiff and had nothing to do with the agreement for sale and as such could be separated from it. He said that the plaintiff was not seeking to enforce the agreement with regard to this charge and I should hold that the claim to possession was also one of such divisible

(1) (1935) A.I.R. Mad. 193.

(2) (1915) 21 C.W.N. 158.

(3) (1917) A.I.R. Mad. 4.

parts. Unfortunately, I find I cannot agree with him. The claim to possession forms, in my opinion, an integral part of the agreement to sell. The vendor is under an obligation to hand over documents of title in his possession and do all that is necessary to make out a good title and when such title is approved of and the conveyance is tendered to him for execution he has to execute the conveyance and simultaneously therewith deliver possession to the purchaser. As I have already mentioned, after the execution of the conveyance there is nothing else which the purchaser is called upon to do, i.e. he is not even called upon to demand possession. The two obligations which the vendor is bound to discharge, arise at one and the same time, viz., to execute the conveyance and to deliver possession. It was suggested that the case was covered by Section 16 of the Specific Relief Act, inasmuch as it should be held that a part of the contract, viz., that relating to delivery of possession stood on a separate and independent footing from the other parts of the contract, viz., that relating to the execution of the conveyance. Mr. Sanyal contended that the two parts stood on different footings inasmuch as possession was a thing which could not be ordered to be given by this Court, but that is clearly not what Section 16 was aiming at. If one of the parties files a suit in a court which is not competent to grant him one of the reliefs he is entitled to, he cannot be heard to say that that part of the contract is one which cannot and ought not to be specifically performed. The ability or inability to perform the contract referred to in Section 16 of the Specific Relief Act clearly relates to the parties to the suit and has no connection with the jurisdiction of the Court to grant a particular relief. Mr. Sanyal further contended that the provisions of the Civil Procedure Code show that in a suit for specific performance of a contract, possession is not ordinarily one of the relief to be given and he drew my attention to the provisions of Order XXI, Rule 32(5). According to Mr. Sanyal Order XXI, Rule 32(5) shows that when a decree for specific performance of a contract is not obeyed, the court may direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court. Mr. Sanyal argued that so far as possession was concerned this rule could not be availed of and the provision applicable to the case of a decree for delivery of possession was that contained in Order XXI,

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Rule 35. This argument however, to my mind proceeds upon a fallacious reasoning. If the plaintiff asks the court to give a decree which is not a decree for specific performance simpliciter but for possession as well, the rights of the parties cannot be governed by the provisions of Order XXI, Rule 32 or Order XXI, Rule 35. In a case like this the decree would have to be drawn up in such a manner that both of these rules could be availed of, if necessary.

Mr. Mukherjee arguing on behalf of the defendant Basak drew my attention to the judgment in *Graham v. Krishna Chunder Dey* (1), where their lordships pointed out "Sections 14 to 17 inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete code, within the terms of which relief of the character in question must be brought, if it is to be granted at all." There has been no argument that section 14 and section 15 of the Specific Relief Act have any application to the facts of this case. As I have already pointed out, I am not able to accede to Mr. Sanyal's argument on the interpretation of section 16. That being so, clearing section 17 is applicable. As I have already pointed out, there can be no doubt that the obligation to deliver possession is an integral part of the agreement for sale, and the cause of action for possession is not different from the cause of action for specific performance, as she has done, she cannot have it unless she complies with the provisions of section 17 of the Specific Relief Act and she cannot do so, if she seeks to exclude her claim to possession.

In view of the above the answers to the issues are as follows:—

Issue No. 1:—The claim to specific performance in this case involves a claim to possession and therefore I must hold that the Court has no jurisdiction to try this suit.

Issue No. 2:—I hold that in a case like this the plaintiff ought not to be given leave under Order II, Rule 2 of the Code of Civil procedure.

Issue No. 3:—I hold that the plaintiff was all along ready and willing to perform her part of the agreement for sale.

(1) 11(1924) 52 I.A. 90.

Issue No. 4:—The plaintiff is not entitled to specific performance of the agreement for sale.

Issue No. 5:—The suit, must therefore, be dismissed with costs.

Certified for two Counsel.

It should however be noted that the plaintiff only pressed her claim to specific performance of the agreement in this case and her claim to a decree for Rs. 30,000/- with interest or alternatively for refund of the said amount, was only incidental to that claim and to be pressed in case the court came to the conclusion that the case was not a fit one for the grant of specific performance or in case the title to the property was found to be defective. This adjudication, therefore, is not to prejudice in any way, her right to enforce the charge created by the agreement dated the 22nd of January, 1948.

Nahari & Dutta: Solicitors for the Plaintiff.

S. K. Ganguly: Solicitor for the Defendant.

S.G.P.

Suit dismissed.

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CRIMINAL REVISION.

Before Mr. Justice B. K. Guha.

KUNTI BALA DASSI

v.

NABIN CHANDRA DAS.*

CRIMINAL.

1954.

May, 12.

Criminal Procedure Code—Sections 488 & 489—Maintenance order by a Magistrate—Subsequent decree for restitution of conjugal rights in favour of the husband—Whether the Civil Court decree for restitution of conjugal rights, in effect, nullifies the order for maintenance under Section 488 Cr. P. C.

*Criminal Revision Case No. 9 of 1954 against the order of Shri A. D. Bagchi, Magistrate, 1st Class, Contai dated the 13th October, 1953.

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The Magistrate is not bound under Section 489(2) Cr. P. C. to cancel the maintenance order made in favour of the wife under Section 488, because a Civil Court has made an order for restitution of conjugal rights in favour of the husband. The mere fact that the Civil Court is satisfied on the point that the husband is prepared to offer the wife a home, which she ought to accept, does not justify the Magistrate in surrendering his own discretion and the magistrate is entitled to decline to revoke the maintenance order when there is no evidence before him as to what home the husband was prepared to offer the wife.

Tarak Nath Dhar v. Sm. Snehasani Dhar: (1) dissented from

Application for revision by the wife against an order by a magistrate revoking a maintenance order.

A decree for restitution of conjugal rights obtained by the husband.

The material facts will appear from the judgment.

N. C. Talukdar and Narendra Nath Guha for the Applicant.

Bholanath Roy for the Respondent.

The judgment of the Court was as follows:

B. K. Guha, J.:—This revisional application at the instance of one Kunti Bala Dasi who is the second wife of opposite party Nabin Chandra Das is directed against an order passed by a Magistrate on 13th October, 1953 cancelling under section 489(2) of the Code of Criminal Procedure the order of maintenance passed in her favour under section 488 of the Code of 31st January, 1953. It appears that on 31st January, 1953 after contested proceedings, maintenance at the rate of Rs. 30/- per month was allowed in favour of the present petitioner against her husband opposite party Nabin Chandra Das. On 13th August, 1953, however, Nabin Das obtained against the present petitioner a decree for restitution of conjugal rights. It was a contested decree. No maintenance was paid by Nabin Chandra Das to the present petitioner in terms of the order

(1) (1946) 52 C.W.N. 166.

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passed in her favour on 31st January, 1953. Thereafter, the petitioner initiated proceedings for execution of the order and while showing cause in these proceedings the husband opposite party submitted that in view of the decree obtained by him against the present petitioner for restitution of conjugal rights, the order for maintenance passed on 31st January, 1953 should be cancelled. The learned Magistrate accepted this contention and cancelled the order of maintenance passed under section 488 of the Code of Criminal Procedure. In doing so, he purported to follow a decision of this Court in the case of *Tarak Nath Dhar v. Sm. Sneharani Dhar* (1), which was decided in 1946 by a judge of this Court. In that case it was held that the effect of a decree for restitution of conjugal rights against the wife (even though *ex parte*) is that the wife is refusing without sufficient reason to live with the husband and in these circumstances, a previous order of maintenance under section 488 is liable to be cancelled unless other circumstances have arisen since the date of the decree. This view of the learned Judge goes against the decision made by a Division Bench of the Bombay High Court in the case of *Fakruddin Shamsuddin Saiyed v. Bai Jehab* (2). In that case it was pointed out by Chief Justice Beaumont that it is not correct to say that the Magistrate is bound under section 489(2) to cancel the maintenance order made in favour of the wife under section 488, because a Civil Court has made an order for restitution of conjugal rights in favour of the husband. It was further pointed out that the mere fact that the Civil Court is satisfied on the point that the husband is prepared to offer the wife a home, which she ought to accept, does not justify the Magistrate in surrendering his own discretion and that the Magistrate is entitled to decline to revoke the maintenance order under section 488 of the Code of Criminal Procedure, when there is no evidence before him as to what home the husband was prepared to offer the wife. With all respect to the view of Lodge, J. in *Tarak Nath Dhar's Case* (1), I am inclined to agree with the views of Chief Justice Beaumont in the Bombay case. Both the cases, however, it will be observed, were decided before the amendment of sub-section 3 of section 488 of the Code of Criminal procedure was made by Act IX of 1949. In that year, that is in 1949, the following proviso was inserted in sub-section 3.

(1) (1946) 52 C.W.N. 166.

(2) (1944) A.I.R. Bom. 11.

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"If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him."

This proviso obviously places the wife on a stronger footing. It has been contended, however, on behalf of the husband that this proviso means that its benefit can be taken only by the first wife when her husband marries for the second time and that so far as the second wife is concerned she is not entitled to the benefit of it except where the husband takes one wife or more after her (that is the second wife's) marriage. In my opinion, there is nothing in the proviso justifying such limited construction of it. The phrase used in the proviso is "has contracted" and not "contracts." The former phrase, is in my opinion, sufficiently wide to entitle the second wife to its benefit even in case where the husband has not married for the third time during the life time of the second wife. That being the position, when on the facts of the present case it has been proved that the husband is living with the first wife, that would be just ground on the part of the second wife to refuse to live with him even if he made an offer to the second wife inviting her to live with him at the same house with the first wife.

In this view of the matter I cannot help observing that the learned Magistrate has to use the words of Chief Justice Beaumont, 'surrendered his own discretion' simply because the husband was armed with a Civil Court decree for restitution of conjugal rights. I have gone through the judgement of the Civil Court myself and I find that that judgment did not proceed on the basis of what is being contended now as justifying the refusal on the part of the second wife to live with the husband. In these circumstances, I am unable to uphold the order passed by the learned Magistrate on 13th October, 1953 cancelling under section 489(z) of the Code of Criminal Procedure the order of maintenance passed under section 488 of the Code of Criminal Procedure.

The order in question is accordingly set aside. It will be for the learned Magistrate now to take appropriate steps under sub-section 3 of section 488 of the Criminal procedure Code for enforcement of the order of maintenance which has been already passed.

The Rule is made absolute accordingly.

S.G.P.

Rule made absolute.

ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat.

RAJPUTANA TRADING CO., LTD.

JUTE GUNNY BROKERS.*

CIVIL.

1954.

March, 22.

Arbitration—Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, Rule VI—Method of appointing arbitrators by the Registrar—Absence of endorsement of appointment of arbitrators under the hand of the Registrar, whether by itself makes the purported appointment null and void.

Where the Registrar of the Tribunal of Arbitration of the Bengal Chamber of Commerce selected two persons to act as arbitrators, and those persons so selected expressed their agreeableness to act as such, but the Registrar, through inadvertence, omitted to endorse the appointment under his hands, though in a subsequent letter by someone acting for the Registrar such appointment was confirmed.

And where the appointment of the arbitrators was challenged on the ground that the appointment was not in writing under the hand of the Registrar, as the Rules of the Tribunal of Arbitration enjoins.

Held: That all documents regarded as one transaction constitute an appointment of the arbitrators in writing under the hand of the Registrar and satisfy the requirements of Rule VI of the Tribunal of Arbitration of the Bengal Chamber of Commerce.

Application to set aside an award of the Arbitration Tribunal of the Bengal Chamber of Commerce, on the ground that the arbitrators were not duly appointed by the Registrar of the said Chamber.

The material facts will appear from the judgment.

P. K. Sen for the Applicant.

D. C. Sethia for the Respondent.

The judgment of the Court was as follows:—

R. S. Bachawat, J.:—This is an application to set aside and declare null and void an award of an Arbitration Tribunal

* Re: Arbitration Suit No. 176 of 1953.

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of the Bengal Chamber of Commerce consisting of Messrs. A. W. Mathers and G. M. Gay. The contention is that Mr. Mathers and Mr. Gay were not duly appointed as Arbitrators by the Registrar of the Bengal Chamber of Commerce.

The dispute relates to a contract which contains an arbitration clause. The arbitration clause provides that the reference shall be to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and that according to such rules the arbitration shall be conducted.

The buyers duly applied for arbitration in accordance with Rule V(1) of the rules of the Tribunal of Arbitration. Under Rule V on receipt of such application the Registrar of the Chamber is enjoined to select and to constitute a Tribunal for the adjudication of the dispute.

Rule VI which provides for appointment of arbitrators reads as follows:

"VI. Unless the agreement to refer the dispute or difference to the Chamber or Tribunal otherwise expressly provides the Court shall consist of two arbitrators who shall be selected by the Registrar from the Tribunal and appointed in writing under his hand."

Learned counsel on both sides have also referred to rules 1(6), IV, VI, VIII, and IX. These rules are as follows:

"1(6) "Registrar." The Registrar of the Tribunal shall be the Secretary for the time being of the Chamber or such other member of the Secretarial staff of the Chamber as shall be acting from time to time.

IV. The duties of the Registrar of the Tribunal shall ordinarily consist of or include the following:—

He shall, by himself or his subordinates, receive applications to the Tribunal and receive payment of fees and costs, appoint the arbitrator or arbitrators and, where

necessary, the umpire who will constitute the Court to deal with any dispute, receive all applications made to the Court by the parties, and communicate to them the orders and directions of the Court keep a registrar of applications to the Tribunal and of awards made by any Court, and such other books and memoranda, and make such returns as the Chamber or the Tribunal shall from time to time require, and generally carry out the directions of any court so constituted, and take such steps as may be necessary to assist any such Court in the execution of its functions.

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VI. Unless the agreement to refer the dispute or difference to the Chamber or Tribunal otherwise expressly provides the Court shall consist of two arbitrators, who shall be selected by the Registrar from the Tribunal and appointed in writing under his hand.

VIII. In the event of the Court originally appointed disagreeing the dispute shall be referred to an umpire and the Registrar shall appoint an umpire to be selected from the list aforesaid to constitute the Court for the adjudication of the said dispute and such umpire shall then proceed with the arbitration in accordance with these rules.

IX. The consent to act of the arbitrator or arbitrators or umpire as the case may be shall be obtained by the Registrar."

Mr. J. J. B. Sutherland since deceased was the Registrar of the Bengal Chamber of Commerce at the relevant point of time.

Rule VI provides for a special method of appointment of arbitrators and that method must be adhered to in appointing the arbitrators.

I am satisfied that Mr. Sutherland duly selected Messrs. Mathers and Gay as Arbitrators. The question still is whether Mr. Sutherland duly appointed Messrs. Mathers and Gay as arbitrators in writing under his hand.

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Exhibit A1 is a proposal to appoint Messrs. Mathers and Gay. This proposal is signed by Mr. Sutherland and reads as follows:—

"I propose to appoint Messrs. A. W. Mathers and G. M. Gay as Arbitrators, and will be glad to know if you have any suggestions to offer."

At the foot of this exhibit the names of Mr. I. G. Kennedy and Mr. H. L. Robertson appear. They are the persons from whom suggestions had been invited by Mr. Sutherland. These gentlemen had no suggestions to give in the matter. Exhibits A1 came back after circulation and in the usual course of business, the appointment of Messrs. Mathers and Gay as Arbitrators should have been endorsed on this exhibit but this was omitted by inadvertence.

On November 26, 1952, Mr. B. B. Roy acting on behalf of the Registrar wrote to Messrs. Mathers and Gay as follows:—

**"THE BENGAL CHAMBERS OF COMMERCE AND
INDUSTRY TRIBUNAL OF ARBITRATION."**

No. 52356 & 57C Royal Exchange,
Calcutta-1; 26th November, 1952.

GENERAL ARBITRATIONS.

A. N. Mathers, Esq., Messrs. Kettlewell Bullen & Co., Ltd.

G. M. Gay, Esq., Case No. 818 G of 1952.

Dear Sir,

I shall feel obliged if you will act as an Arbitrator in a dispute under contract No. 34682 dated 3rd September, 1951.

Mr. G. M. Gay of Messrs. J. Thomas & Co., is being asked to act with you.

If you are agreeable to act, please date, sign, and return the enclosed form at an early date.

Yours faithfully,

Sd/- B. B. Roy.

Enclosure:—Form.

On November 27, 1952, both Messrs. Mathers and Gay wrote back and each of them stated—

“I am agreeable to act as Arbitrator in the dispute referred to in your letter No. 52357C dated 26-11-52.

On December 10, 1952, Mr. B. B. Roy acting on behalf of the Registrar wrote to Messrs. Mathers and Gay as follows:—

“THE BENGAL CHAMBERS OF COMMERCE AND
INDUSTRY TRIBUNAL OF ARBITRATION.”

No. 54273 & 74C Royal Exchange,
Calcutta, 10th December, 1952.

GENERAL ARBITRATIONS.

A. W. Mathers, Esq.,
G. M. Gay, Esq.

Dear Sir,

Re:—Case No. 818G of 1952.

With reference to my letter No. 525562 of 26-11-52 and your reply of 27-11-52, I have to inform you that you and Mr. G. M. Gay of Messrs. J. Thomas & Co., are constituted as the Court to adjudicate on the dispute in question.

Yours faithfully,
Sd/- B. B. Roy,
for Registrar.

These several documents regarded as one transaction constitute an appointment of the arbitrators in writing under the hand of the Registrar and satisfy the requirements of Rule VI.

In Reuss v. Picksley (1), it was held that a proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds which require a memorandum or note of the agreement

(1) (1866) 1 Exchequer 342.

Civil.

1954.

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Trading Co.,
Ltd.

v.
Jute Gunny
Brokers.

R. S.
Bachawat, J.

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Bachawat, J.

in writing by the party to be charged therewith or his agent. Willes, J. in delivering the judgment of the Court of Exchequer Chamber observed thus at P. 351:—

“The proposal so signed and assented to, does become a memorandum or note of an agreement within the 4th section of the Statute. Many cases might be put in illustration of this proposition, but one or two will be sufficient. Take for example a case arising under the joint Stock Companies Act (19 & 20 Vict. C. 47). Whereby it is provided that no person shall be deemed to have accepted any share in the company unless he testifies his acceptance by writing under his hand (Schedule Table B). It was at first supposed that something must be done by the shareholder in writing after allotment and that otherwise he would not be a shareholder because he proposed in writing to become one and to accept his shares upon allotment. But the Court of Common pleas, when the case was brought before them, said that it was a mistake to suppose that under these circumstances there was to acceptance in writing. The true mode, they said, of regarding such a transaction was that it was from beginning to end one transaction, and accordingly they held that the acceptance was complete, and the Statute satisfied by a proposal in writing to accept the shares, followed by allotment.”

By parity of reasoning the proposal to appoint Messrs. Mathers and Gay as arbitrators made in writing under the hand of the Registrar followed by acceptance of the proposal at the request of the Registrar and the consent of the Arbitrators to act as such is a sufficient appointment of Messrs. Mathers and Gay in writing under the hand of the Registrar.

It is not necessary to consider if the appointment is validly made under the rules of the Tribunal of Arbitration on other grounds.

• The application is dismissed with costs.

Leslie & Khetry: Solicitors for the Applicant.

P. D. Himatsingha & Co.: Solicitors for the Respondents.

S.G.P.

Application dismissed with costs.

CRIMINAL REVISION.

*Before Mr. Justice J. P. Mitter and
Mr. Justice S. K. Sen.*

KALIDAS BANERJEE & ORS.

THE STATE.*

CRIMINAL.

1954.

June, 23.

Criminal Procedure Code—Section 540A—Exemption from personal attendance of the accused—Circumstances under which the accused may be granted such exemption.

Section 540A of the Code of Criminal Procedure is the only section which can be invoked, after a trial has begun, for the purpose of granting exemption to an accused from personal attendance during the trial. But under that section, the Court has jurisdiction to dispense with the attendance in Court of an accused person only where such accused person is "incapable of remaining before the Court." The words "incapable of remaining" must refer to an accused's physical incapacity to remain before the Court, and not merely his inconvenience.

Application for Revision against an order of the Magistrate refusing to dispense with the accused's personal attendance in Court during trial.

The material facts will appear from the judgment.

Jatish Chandra Banerjee for the Applicant.

J. M. Banerjee for the State.

The judgment of the Court was as follows:—

J. P. Mitter, J.—These Rules are directed against an order of Mr. J. Sarma Sarkar, Presidency Magistrate, Calcutta, dated the 29th of May, 1954, refusing to exempt the petitioners from appearing in Court during their trial in the three cases concerned. The question to be determined concerns the extent of the Court's jurisdiction under section 540A of the Code of Criminal Procedure to dispense with the attendance of an accused when he is being trial with another or more accused persons.

* Criminal Revision Case Nos. 682 & 684 of 1954.

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J. P. Mitter, J.

It appears that by an order, dated 24th March, 1954 the learned Magistrate dispensed with the attendance in Court of one of the petitioners. This order was subsequently vacated on the ground that the jurisdiction of the Court to grant such exemption was, by section 540A, limited to an accused's incapacity to remain before the Court. By the last mentioned order, which is complained of here, the learned Magistrate also discussed his powers under sections 205 and 253, Criminal Procedure Code to dispense with an accused's attendance in court.

Upon our construction of the words "incapable of remaining before the Court" must depend the jurisdiction of the Magistrate to dispense with the attendance in Court of an accused person. In our view, the words "incapable of remaining" must refer to an accused's physical incapacity to remain before the Court.

That being so, no accused is entitled under section 540A, Criminal Procedure Code, to any exemption from appearance in Court unless it is proved that he is physically incapable of remaining before the Court. Having regard to the language used, it is impossible for us to give the words any other meaning. On the facts of this case, the petitioners can be said to be only inconvenienced if their attendance is required in Court. This is not a case of physical incapacity precluding the petitioner's attendance in court.

Section 205, Criminal Procedure Code in terms refers to the power of a Magistrate who issues a summons. He may under sub-section (1) of section 205 dispense with the personal attendance of the accused and permit him to appear by his pleader, Sub-section (2) which empowers a Magistrate enquiring into or trying the case to direct the personal attendance of the accused has reference to an exemption already granted by the Magistrate issuing summons. Section 205, Criminal Procedure Code does not, in our view, confer upon a trial court the power to dispense with the personal attendance of an accused during his trial. Section 353, Criminal Procedure Code cannot also be said to confer upon a Magistrate trying a case any power to dispense with the personal attendance of an accused. On this point we have been referred to a decision of the Madras High

Court in *Re: Ummal Hasanath* (1). In that case Rajamannar, J. (as he then was) inclined to take the view that section 353, Criminal Procedure Code by necessary implication conferred upon the Court a power to dispense with the personal attendance of an accused person. We respectfully dissent from that view, for we cannot see how the section concerned can be said by implication to confer any such power upon a Court. That being the position, the only section which, in our view, can be invoked for the purpose, after a trial has begun, is Section 540A, Criminal Procedure Code which, as we have said before, must be limited to cases of physical incapacity precluding an accused from appearing or remaining in Court.

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In that view of the matter, the learned Magistrate was right in dismissing the applications for exemption by the petitioners. We see no reason to exercise our own discretion in the matter under section 561A of the Code of Criminal Procedure.

In the result the applications fail and the Rules are discharged.

S. K. Sen, J.:—I agree.

S.G.P.

Rules discharged.

(1) (1948) I.L.R. Mad. 498.

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

CIVIL.

RADHANATH MAITY

v.

RAM CHANDRA NAYEK.*

1954.

January, 28.

Mortgage—Right of redemption—Mortgage suit impleading landlord as defendant—Plea of "paramount title" and of misjoinder by landlord—Suit dismissed as against the landlord on such plea—Whether in a future proceedings the landlord can claim right of redemption.

Civil Procedure Code—Section 47—Dismissal of a suit against a party on his own plea of misjoinder—Whether he is a "party to the suit" whether such dismissal is a dismissal within the Section 47 of Civil Procedure Code.

When in a mortgage suit a party claims only a paramount title and raises a plea of misjoinder on that basis and succeeds in getting the suit dismissed against him, which really means in law his dismissal or discharge from the suit on such plea, he forfeits his right of redemption, if any, in respect of the said mortgage and becomes disentitled to claim such right in any future proceeding.

The dismissal of a suit against a particular party on ground that he is not a necessary party is not a dismissal within the relevant explanation of Section 47 of the Code of Civil Procedure. Such a dismissal of the suit is really a discharge or dismissal of the party concerned from the suit and ought to be so construed in law and he that is so he is "no longer a party to the suit."

Appeal by the Defendant.

Suit under Order XXI Rule 103 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Basanta Kumar Panda for the Appellant.

Hiran Kumar Roy for the Respondent.

The judgment of the Court was as follows:—

P. N. Mookerjee, J.:—Two brothers Ashutosh Maity and Behary Maity held the suit land as tenants under the appellants. Behary died leaving his widow Rashi Dei as his sole heiress. The appellants as landlords brought a rent suit against their tenants Ashutosh and Rashi Dei and in execution of the decree

* Appeal from Appellate Decree No. 48 of 1949, against the decree of Sri M. N. Ray, Subordinate Judge, 1st Court of Zillah Midnapore in Title Appeal No. 8 of 1948, dated 20th of September, 1948 affirming the Decree of Sri N. B. Choudhuri, Munsif, 1st Court Tamluk, dated the 28th of November, 1947.

obtained therein purchased the disputed holding on the 19th November 1936. Prior to the institution of the rent suit Ashutosh had purported to mortgage the suit land to the contesting respondent's father Keshab Nayek by a duly registered deed sometime in the year 1928. The amount secured by the deed was Rs. 300/-. In the mortgage suit which was brought in the year 1940 the appellants as rent sale purchasers as aforesaid were impleaded as defendants but eventually the suit was dismissed against them for non-prosecution upon their plea of a paramount title. In execution of the mortgage decree the property was purchased by the mortgagee decree-holders (who are the contesting respondents before me) on the 17th June 1944 but the respondents' attempt to take possession was resisted by the appellants and eventually the latter's application under Order XXI, Rule 100 of the Code of Civil Procedure was allowed by the Court on the 28th April 1945.

• Within a year from the date, last mentioned above, the said respondents brought the present suit under Order XXI, Rule, 103 of the Code on the 27th April 1946 on the allegation *inter alia* that at the time of the mortgage to their father Keshab Nayek the mortgagor Ashutosh was the 16 annas owner of the disputed holding, he having obtained, as the presumptive reversioner, a surrender in his favour from his deceased brother's widow Rashi Dei, that the full 16 annas share of the holding was duly mortgaged by Ashutosh to their father Keshab Nayek who acquired the entire holding at his mortgages sale and as the said mortgage had not been annulled by the appellants after their auction purchase at the rent sale the respondents' title to the suit land must prevail over the appellants.

The suit was contested by the appellants whose main defence was that it was barred by *limitation* and also by section 47 of the Code of Civil Procedure and that the mortgage had been duly annulled by them and further that the story of Rashi Dei's surrender in favour of Ashutosh was false. This last defence has been accepted by the two courts below but they have concurrently over-ruled the appellants' other pleas.

As a result the suit has been decreed in part, viz., to the extent of the moiety of Ashutosh which alone was validly mortgaged to the plaintiffs respondents' father Keshab Nayek and which alone, therefore, passed to the said respondents on the strength of the mortgage sale. Against this decree the present

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second appeal, has been preferred by the defendants to this Court.

Before me three points have been urged in support of the appeal. Mr. Pandas's first contention is that the respondents' mortgage had been duly annulled according to law by the service of a notice under section 167 of the Bengal Tenancy Act on the 27th June 1946. He has argued next that as the mortgage suit was dismissed against the appellants they must be deemed to be parties to the mortgage suit for purposes of section 47 of the Code under the explanation appended thereto and that, accordingly, the present suit is barred under the provisions of that section. Lastly, it has been urged that even if the appellants fail in their claim of a paramount title they have clearly under the law an interest in the equity of redemption which remained unaffected by the mortgage decree whether the mortgage suit be taken as having been dismissed against them or they be deemed to have been dismissed or discharged from it and, that being so and a fresh suit on the mortgage having admittedly become time-barred in the meantime, the respondents' present action must fail on the ground of limitation.

The first point may now be conveniently disposed of. The mortgage in question was created by a registered document as required by law. According to both the courts below the appellants must be deemed to have had notice of the mortgage immediately on the completion of their purchase at the rent sale because of registration of the mortgage bond. The courts below have also found that, in the circumstances disclosed in the evidence adduced in the case, the appellants must be held to have had notice of the mortgage at least in June 1938 when in a title suit in which they were parties the said bond was filed in court. In the facts and circumstances of this case, I have no reason to differ from the said findings. I need only add that the first of the findings is amply supported by the decision of this Court in the case of *Sarala Sundari Debi Choudhurani v. Purna Chandra Bhattacharjee* (1), on which the two courts below relied and that the case of *Gopinath Biswas and ors. v. Radhashyam Poddar* (2), cited at the bar on behalf of the appellants, has little relevancy as this latter decision was given long before the relevant amendment of the definition of notice contained in section 3 of the Transfer of Property Act (vide Explanation 1).

(1) (1941) 46 C.W.N. 409. (2) (1900) 24 C.W.N. 657.

The second finding, noted above, is a finding of fact but, even apart from that the courts below have given ample indication that the facts and circumstances of this case were sufficient to put the appellants to enquiry as regards the respondents mortgage so as to attract the general doctrine of constructive notice and they have held that that doctrine applies in the matter determination of the starting point of limitation under the second point of Section 167(1) of the Bengal Tenancy Act with the decision of this Court in the case of *Gopal Lal Chandra v. Amulyakumar Sur* (1), Vide also *Yusuf Gazi v. Asmatullah & ors.* (2) referred to and explained in that decision,—which was cited by the appellants learned Advocate. I accordingly, hold that the appellants had notice of the relevant mortgage at least in June, 1938 and as the notice under section 167 of the Bengal Tenancy Act was served only in June, 1940 it was long beyond the statutory period of one year and was as such ineffective in law to annul the mortgage. The first point raised in support of the appeal must therefore, fail and it is over ruled.

On the second point too the appeal cannot succeed as it seems proper to hold and the recent authorities clearly support that view that the dismissal of a suit against a particular party on the ground that he is not a necessary party is not a dismissal within the relevant explanation of section 47 of the Code. Vide in this connection *Abdul Sac v. Sundar Mudalier* (3), and *Mt. Kusmi and others v. Sadasi Mahats and others* (4). Such a dismissal of the suit is really a discharge or dismissal of the party concerned from the suit and ought to be so construed in law and if that is so he is "no longer a party to the suit". Vide *Seth Manakchand v. Chaube Manoharlal & ors.* (5). The plea, therefore, that section 47 is a bar to the respondents present suit cannot be sustained.

The third point also must be decided against the appellants. When in a mortgage suit a party claims only a paramount title and raises a plea of misjoinder on that basis and succeeds in getting the suit dismissed against him which really means in law, as pointed out above, his dismissal or discharge from the suit on such plea, he forfeits his right of redemption, if any, in

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(1) (1933) A.I.R. Calc. 254.

(2) (1912) 15 I.C. 430.

(3) (1930) I.L.R. 54 Mad. 81 (F.B.) (S.C.); A.L.R. Mad. 317 (F.B.)

(4) (1942) I.L.R. 21 Pat. 601 (S.C.); A.I.R. Pat. 432.

(5) (1943) L.R. 71 I.A. 65 at 73.

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respect of the said mortgage and becomes disentitled to claim such right in any future proceeding. This was laid down by the Judicial Committee more than half a century back in the well-known case *Nilkant Banerji v. Suresh Chunder Mullick and ors.* (1), and the proposition has ever since been accepted always and never questioned. It must be held, therefore, that the appellants retained no right of redemption in respect of the respondent's mortgage after the dismissal of the mortgage suit against them and the mortgage decree eventually passed in that suit was not subject to any right of redemption in favour of the appellants. The foundation of the appellants argument on the plea of limitation thus disappears leading inevitably to the rejection of the third point urged by their learned Advocate.

On behalf of the appellants, a further argument appears to have been made in the courts below. At one stage it was sought to be advanced on their behalf in this Court too but eventually it was given up. That argument was that, as against them the suit having been dismissed on their claim of a paramount title, such title must be held to have been established and could not be subsequently challenged. Such an argument needs no answer beyond this that there was no adjudication on this question but just a dismissal of the suit against the appellants which meant in law only their dismissal or discharge from the action, as pointed out above, on the well known principle that a claim of paramount title being "outside the controversy" in a mortgage suit. Vide *Radha Kisun v. Kurshed Hossein and others* (2), and *Seth Manakchand v. Chaube Manoharlal and others* (3), and thus beyond the scope of the suit the claimant should be left out or discharged from the action and his claim or rights in that behalf should not be made the subject matter of determination in the suit. This further . . . argument of the appellants therefore, has little merit and deserves no serious attention.

In the result all the points, urged in support of this appeal fails. The appeal is, accordingly, dismissed but, in the circumstances of this case, I direct that the parties will bear their own costs in this court.

S.G.P. Appeal dismissed.

(1) (1885) 12 I.A. 171. (2) (1919) 47 I.A. 11.
 (3) (1943) 71 I.A. 65.

SUPREME COURT.

APPELLATE CIVIL.

*Before Mr. Justice B. K. Mukherjea, Mr. Justice N. C. Aiyar
and Mr. Justice N. H. Bhagwati.*

GANESHI LAL

v.

JOTI PERSHAD.*

CIVIL.

1952.

November, 7.

*Subrogation—Redemption of mortgage by a co-mortgagor—Extent of his
rights of re-imbursement as subrogee—Section 92 of the Transfer of
Property Act.*

Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well-recognised that where there are several joint debtors, the person making the payment is a principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors. Such being the legal position as among the co-mortgagors, if one of them redeems a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to re-imburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share.

So compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or mortgagee would be to perpetuate an inequity or injustice, as it would mean that the debtor who is in a position to pay and pays up can obtain an advantage for himself over the other joint debtors. Such a result will not be countenanced by equity; the favouritism shown by law to a surety, high as it is, does not extend so far. The surety can ask to be indemnified for his loss; he can invoke the doctrine of subrogation as an aid to his right of contribution.

If it is equitable that the redeeming co-mortgagor should be substituted in the mortgagee's place, it is equally equitable that the other co-mortgagors should not be called upon to pay more than he paid in discharge of the encumbrance.

* Civil Appeal No. 166 of 1951 from the Judgment and Decree dated the 15th September 1948 of the High Court of Judicature for the State of Punjab at Simla (Mahajan and Teja Singh JJ.) in Regular Second Appeal No. 1844 of 1945 from the Judgment and Decree dated the 5th June 1945 of the Court of the District Judge, Gurgaon in Civil Appeal No. 171 of 1943, arising out of Judgment and Decree dated the 27th August 1943 of the Court of the Sub-Judge, Gurgaon, in Civil Suit No. 11 of 1943.

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Appeal by the Defendant,

1952.

Suit for Partition.

Ganeshi Lal

v.

Joti Pershad.

The material facts will appear from the judgment.

N. C. Aiyar, J.

Tarachand Brijmohan Lal for the Appellant.

Gurubachan Singh and Radha Krishna Aggarwal for the Respondent.

The judgment of the Court was as follows:—

November, 7.

N. C. Aiyar, J.:—The plaintiffs, Joti Prasad and Sat Narain, sued for partition and possession of their two-fifths share in the suit properties alleging that the first defendant was alone in possession of the same, having redeemed a mortgage executed by the joint family of which the plaintiffs and defendants were members, in favour of one Raghunath in the year 1896 on paying Rs. 5,800. Defendants 2 to 5 were impleaded as co-sharers. Out of them, defendants 2 and 3 admitted the claims of the plaintiffs. Defendant 4 died pending suit, and her name was struck off. Defendant 5 supported the first defendant. On the date of the trial court's decree, the two plaintiffs were held entitled to one-sixth share each.

The first defendant resisted the plaintiffs' claim. He contended that the redemption by him in 1920 was not on behalf of the joint family as alleged by the plaintiffs but on his own account as there had been a disruption of the joint family status much earlier, and that before the plaintiffs could get any relief, they were bound to pay him not merely a proportionate share in the sum of Rs. 5,800 which he paid to the mortgagee for redemption but their share in the original mortgage debt of Rs. 11,200. He also denied that the original mortgage was executed on behalf of the joint family.

The Subordinate Judge, and on appeal, the High Court found that the original mortgage was a mortgage transaction of the joint family, and that the first defendant, Ganeshi Lal, redeemed the mortgage on his own account and for his own benefit at a time when there was no longer any joint family in existence.

It was further held by the trial court that the plaintiffs and other co-sharers were bound to pay their proportionate share of the amount paid by the first defendant to redeem the mortgage, namely, Rs. 5,800. But from this a sum of Rs. 1,200 which he had already received by way of redemption of certain mortgage rights had to be deducted. The District Judge enhanced this sum of Rs. 4,600 to Rs. 5,000, as the first defendant had paid taxes due on the property up to 1940, but he confirmed the main findings of the Subordinate Judge. A second appeal preferred by the first defendant was dismissed by the High Court at Simla (Mehar Chand Mahajan and Teja Singh JJ.). They repelled the contention of the first defendant that a suit for partition and possession was not maintainable without bringing a suit for redemption. They also negatived his right to get a proportionate share in the amount of Rs. 11,200 due on the mortgage. Two other learned Judges gave leave to appeal under section 109(c) of the Civil Procedure Code, as a substantial question of law was involved.

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Three points were argued before us by learned counsel for the appellant; firstly, there was an assignment of the mortgage in favour of the appellant with the result that the entire rights of the mortgagee vested in him; secondly, even viewing the question as one of legal subrogation, he was entitled, under the principles of justice, equity and good conscience which governed the State of Punjab, as the Transfer of Property Act has not been applied to the State, to recover from the co-mortgagors not merely their shares in the sum of Rs. 5,800 which he had paid for redemption but their shares in the full amount of Rs. 11,200 due under the mortgage; and thirdly, that the suit for partition without asking for redemption was not maintainable.

Points Nos. 1 and 3 have no force whatever. The registered deed of redemption does not contain any words of assignment. To say that Ganeshi Lal shall be the owner of the entire amount due from the mortgaged property is something different from stating that the security has been assigned in his favour. On the other hand, the endorsement of receipt of payment on the back of the mortgage deed itself and the statement of the mortgagee that he has released the mortgaged property from his mortgage go to show that there was no assignment.

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N. C. Aiyar, J.

The non-maintainability of the suit does not seem to have been in issue either before the trial court or before the District Judge, and it appears to have been raised for the first time before the High Court. It was pointed out by the learned Judges, and quite rightly, that so long as no question of limitation was involved, there was no objection to a claim for redemption and one for possession and partition being joined together in the same suit.

Only the second point remains for consideration, and this raises an interesting question of law. It is not denied that Ganeshi Lal who redeemed the prior mortgage is subrogated to the mortgagee's rights, but the controversy is about the extent of his rights as subrogee. By virtue of the redemption, does he get all the rights of the mortgagee and hold the mortgage as a shield against the co-mortgagors for the full amount due on the mortgage on the date of redemption whatever he may have himself paid to get it discharged, or does he stand in the mortgagee's shoes only to the extent of getting reimbursed from the co-mortgagors for their shares in the amount actually paid by him? The lower courts have held that the latter is the correct position in law, but the appellant has challenged it as unsound.

The first two clauses of the present section 92 of the Transfer of Property Act run in these terms:

"Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems."

It is a new section and was inserted by the amending Act XX of 1929. The original sections 74 and 75 conferred the

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right to redeem in express terms only on second or other subsequent mortgagees, though the co-mortgagor's right to subrogation on redemption was recognised even before the Act. As the Transfer of Property Act has not been extended to the State of East Punjab, it is unnecessary to decide whether section 92 is retrospective in its operation, on which point there has been a conflict of opinion between the several High Courts. Section 95 of the Act, which removed the confusion caused by the old section, which conferring on the co-mortgagor what was called a charge, and thus seeming to negative the application of the doctrine of subrogation, is also inapplicable to the present case. We therefore steer clear of section 74 and 75 of the old Act and sections 92 and 95 of the present Act, and we are free to decide the question on principles of justice, equity and good conscience.

If we remember that the doctrine of subrogation which means substitution of one person in place of another and giving him the rights of the latter is essentially an equitable doctrine in its origin and application, and if we examine the reason behind it, the answer to the question which we have to decide in this appeal is not difficult. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well-recognised that where there are several joint debtors, the person making the payment is a principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors. Such being the legal position as among the co-mortgagors, if one of them redeems a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share. This proposition is postulated in several authorities. In the early case of *Hodgson v. Saw* (1), Lord Brougham said:

"The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement."

(1) 3 Myl. & K. 183; 40 E.R. 701.

I have italicised the word "*reimbursement*." Sheldon in his well-known treatise on Subrogation has got the following passage in section 13 of the Second Edition:

"There is another class of cases in which he who has paid money due upon a mortgage of land to which he had some title which might be affected or defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who held also the right to redeem, have paid a contribution."

Be it noted that what is spoken of here is a contribution.

Dealing with the subject of subrogation of a surety by payment of a promissory note and citing the observations of the Alabama Court, Harris says in his work on Subrogation (1889 Edition) at page 125:

"The rule is, that a surety paying a debt, shall stand in the place of the creditor; and is entitled to the benefit of all the securities which the creditor had for the payment of the debt, from the principal debtors; in a word, he is subrogated to all the rights of the creditor; the surety, however, cannot avail himself of the instrument on which he is surety, by its payment. By payment it is discharged and ceases to exist; and the payment will not, even in equity, be considered an assignment; the surety merely becomes the creditor of the principal to the amount paid for him."

To compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or mortgagee would be to perpetrate an inequity or injustice, as it would mean that the debtor who is in a position to pay and pays up can obtain an advantage for himself over the other joint debtors. Such a result will not be countenanced by equity; the favouritism shown by law to a surety, high as it is, does not extend so far. The surety can ask to be indemnified for his loss; he can invoke the doctrine of subrogation as an aid to his right of contribution. Sheldon says in section 105 of his book:

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"The subrogation of a surety will not be carried further than is necessary for his indemnity; if he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him. He cannot speculate at the expense of his principal; his only right is to be repaid."

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In section 178, Harris is still stronger:

"Since subrogation is founded on principles of equity, the surety who would avail himself of the doctrine and invoke equity must do equity; and while he is entitled to a reimbursement in all that he pays out properly for his principal; debt interest and cost, he is not entitled, in any way to recover more than he has paid. For instance, if he pays the debt of his principal, in depreciated currency, the rule would seem to be that he could demand from the principal only the value of that currency at the time he made the payment. Nor would he upon principles of equity be permitted to purchase the debt at a discount and then be subrogated, to collect the whole face of the debt, and especially if he held securities, or if the creditor held securities which would fall into his hands, out of which to pay the debt; because the securities are trust funds for the purpose, and set aside for the payment of that debt and an assignee of trustee cannot speculate in the purchase of claims against the fund in his hands. It would not be equality; it would not be equity."

While it can be readily conceded that the joint debtor who pays up and discharges the mortgage stands in the shoes of the mortgagee, and secures to himself the benefit of the security by such payment, the extent to which he can enforce his right as against the other joint debtors is a different matter altogether. In his monumental work on Equity Jurisprudence, Pomeroy points out that he will be subrogated to the rights of the mortgagee, only to the extent necessary for his own equitable protection. (See, page 632 of Volume IV of the Fifth Edition by Symons). Clearer still is the passage found at page 640 of the same book:

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"The mortgagor himself who has conveyed the premises to a grantee in such manner that the latter has assumed payment of the mortgage debt becomes an equitable assignee on payment, and is subrogated to the mortgagee, so far as is necessary to enforce his equity for reimbursement or exoneration from such grantee."

It is as regards the excess of the payment over his own share that the right can be said to exist. Pomeroy says this at pages 660 and 661:

"In general, whenever redemption by one of the above-mentioned persons operates as an equitable assignment of the mortgage to himself, he can keep the lien of it alive as security against others who are also interested in the premises, and who are bound to contribute their proportionate shares of the sum advanced by him, or are bound, it may be, to wholly exonerate him from and reimburse him for the entire payment. . . . The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redeptor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment in order to secure such contribution, are the efficient means by which equity completely and most beautifully works out perfect justice and equality of burden, under these circumstances"

Whatever the difference might be between the English Law and the Indian Law as regards the right to enforce decrees and securities for the due payment of a debt in the case of a surety who discharges a simple money debt and a surety who pays up a mortgage, it is still noteworthy that Section V of the Mercantile Law Amendment Act of 1856 (England) provided for indemnification by the principal debtor for the advances made and loss sustained by the surety.

There is a distinction in this respect between a third party who claims subrogation and a co-mortgagor who claims the right, and this is brought out by Sir Rashbehary Ghose in his Law of Mortgage in India, Volume I, 5th Edition. He says:

at page 354, pointing out that co-mortgagors stand in a fiduciary relation:

"I should add that an assignee of a mortgage is entitled, as a rule, to recover whatever may be due on the security. But if he stands in a fiduciary relation, he can only claim the price which he has actually paid together with incidental expenses."

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The right of the co-mortgagor who redeems the mortgage is spoken of as the right of reimbursement at page 372 in the following passage:

"Strictly speaking, therefore, when one of several mortgagors redeems a mortgage, he is entitled to be treated as an assignee of the security which he may enforce in the usual way for the purpose of re-imbursing himself."

The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is, strictly speaking, a right of reimbursement or contribution, and in law, when we have regard to the principles of equity and justice, there should be no difference between a case where he discharges an unsecured debt and a case where he discharges a secured debt. It is unnecessary for us to decide in this appeal whether section 92 of the Transfer of Property Act was intended to strike a departure from this position when it states that the co-mortgagor shall have the same rights as the mortgagee whose mortgage he redeems, and whether it was intended to abrogate the rule of equity as between co-debtors, and provide for the enforcement of the liability on the basis of the amount due under the mortgage; and this is because, as has been already stated, we are governed not by the statute but by general principles of equity and justice. If it is equitable that the redeeming co-mortgagor should be substituted in the mortgagee's place, it is equally equitable that the other co-mortgagors should not be called upon to pay more than he paid in discharge of the encumbrance.

In this connection, reference may be made with advantage to the decision of Sir Asutosh Mookerjee and Teunon JJ. in *Digambar Das v. Harendra Narayan Panday* (1) where the ques-

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tion arose as regards the rate of interest and the period for which the redeeming co-mortgagor would be entitled. There is an elaborate examination of the nature of the right of subrogation obtained by one of several joint co-mortgagors who redeems the mortgaged property, and in the course of the discussion the following observations occur:

"In so far as the amount of money which he is entitled to recover from his co-mortgagors is concerned, he can claim contribution only with reference to the amount actually and properly paid to effect redemption to which sum he can add his legitimate expenses The substitution, therefore, of the new creditor in place of the original one, does not place the former precisely in the position of the latter for all purposes If therefore one of several mortgagors satisfies the entire mortgage debt, though upon redemption he is subrogated to the right and remedies of the creditor, the principle has to be so administered as to attain the ends of substantial justice regardless of form; in other words, the fictitious cession in favour of the person who effects the redemption, operates only to the extent to which it is necessary to apply it for his indemnity and protection."

There is a definite expression of opinion by the Madras High Court on the point in the decision reported in *Suryanarayana v. Sriramulu* (1). In that case, a purchaser of a half share of the equity of redemption claimed to recover half of the amount of the mortgage on the security of the other share in the hands of the defendant, and it was held that as his purchase of the decree on the mortgage was prior to his purchase of the equity of redemption, he was entitled to the full amount claimed by him. The learned Judges distinguish the case from one where one of two mortgagors discharges an encumbrance binding on both, and say that in such a case the mortgagor doing so could not recover from his co-mortgagors more than a proportionate share of the amount actually paid by him.

After this rather lengthy discussion of the subject, we consider it unnecessary to notice and comment on the several de-

(1) (1913) 25 M.L.J. 16.

cisions cited for the appellant. It may be said generally that they only lay down that in cases where the Transfer of Property Act, as it stood originally or as amended in 1929, is not applicable, we are governed by the principles of equity, justice and good conscience, and that sections 92 and 95 embody such principles. None of the cases deals with the extent or degree of subrogation, and there is nothing in them which runs counter to the view that the doctrine must be applied along with other rules of equity, so that the person who discharges the mortgage is amply protected, and at the same time there is no injustice done to the other joint debtors. He who seeks equity must do equity, and we shall be violating this rule if we give effect to the appellant's contention. The High Court, in our opinion, reached the correct conclusion.

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The parties are not agreed on the shares to which the plaintiffs are entitled, and this is because after the date of the final decree some of the branches have become extinct by the deaths of their representatives. Whether under customary law in the Punjab, uncles exclude nephews or they take jointly, and whether succession is *per stirpes* or *per capita*, was the subject of disagreement at the Bar before us. This question must therefore be left over for determination by the trial court, and the case will have to go back to that court for effecting partition and delivery of possession according to the shares to which the plaintiffs may be found entitled.

Subject to what is contained in the foregoing paragraph, the appeal will stand dismissed with costs.

Nehal Chand Jain, Agent for the Appellant.

B. P. Maheshwari, Agent for the Respondent.

S.G.P.

Appeal dismissed with costs.

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Before Mr. Justice Sinha.

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Constitution of India, Articles 226 and 311 (1) & (2)—Applicability of—Termination of service of a Government employee under a contract of service—Whether means 'removal' or 'dismissal'—Rule 49 of the C.S. (C.C.A.) Rule, Explanation (c)—Remedy open to the petitioner—An employee treated as a permanent one whether plea of mistake can make it temporary.

Article 226 of the Constitution is not applicable to a case where a Government employee's service is terminated, when he holds the appointment under a contract of service, upon a notice of such termination, as in the act no constitutional provision has been infringed.

Article 311 (1) of the Constitution applies only where there is a 'removal' or a 'dismissal.' Thus, is a contract of service and when that service has to be terminated in terms thereof, the general rules regarding the removal from service or dismissal applicable to civil servants do not apply.

When a person after serving the full terms of probation enters into a written agreement with the Government whereby the conditions of service are to be regulated and when such agreement, *inter alia*, provides that at any time during the period of the agreement and without assigning any reason therefor his service may be terminated by giving him three calendar months' notice in writing or by paying him three months' salary in lieu of notice and that he shall be and is subject to all the rules and regulations of the Government for the time being relating to persons employed by the Government and applicable to his employment for the time being.

Held that his employment is permanent and not temporary, the plea of mistake will be of no avail to the Government to convert the post to a temporary one, termination of such service by giving one calendar month's notice is not in order but in such a case the employee's remedy lies in bringing an action for damages for a breach of contract or he can file a suit for a declaration that he is still in the employ of the Government and not under Article 226 of the Constitution—

* Re: Original Side Matter No. 12 of 1953.

Held further that in the facts stated the provisions of Article 311 (a) do not apply and the formation mentioned therein, namely, giving him a reasonable opportunity of showing cause, are not necessary.

Explanation (c) of Rule 49 of the C.S. (C.C.A.) Rule to the effect that the termination of employment of a person engaged under a contract in accordance with the terms of his contract not amounting to removal or dismissal takes the case out of the ambit of Article 311 (1) of the Constitution of India.

Shyam Lal v. The State of Uttar Pradesh (1) and *Satish Chandra Anand v. The Union of India* (2) applied.

The material facts will appear from the judgment.

Niren Dey for the Applicant.

G. P. Kar and Arun K. Mukherjee for the Respondent.

The judgment of the Court was as follows:—

Sinha, J.:—The petitioner, Sm. Anima Munshi was a telephone operator in the telephone system which operates in the City of Calcutta. Prior to the Government taking over the running of telephone in the city, it was being run by the Bengal Telephone Corporation Limited, a public limited company. In 1941, a company named Government Telephone Board Limited was formed by the Government of India to acquire the share capital of telephone companies operating all over India, including the Bengal Telephone Corporation Limited (hereinafter referred to as the Corporation) which operated in Calcutta. At first, the Government acquired a majority of the shares but allowed the company to function as before. Sometime in March 1943, the Government of India passed orders, regarding the future organisation of the system of telephones all over India. We are concerned only with what happened in Calcutta. Upon the expiry of the license of the Corporation on 1st April 1943, it was to be taken over by Government and placed under the administrative control of the Director General of Posts & Telegraphs. The staff of the company was to be taken over on the existing terms and conditions of service with the exception of those who had attained the age of 55 years. Staff employed after

(1) (1954) S.C.A. 476.

(2) (1953) A.I.R. (S.C.) 250.

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1st April 1943 was to be recruited on the terms and conditions applicable to Government servants of corresponding and comparable grades but in the case of female operators of the Calcutta Telephone District, they were to be recruited on the same terms as the Corporation. In the days of the Corporation, female operators were recruited upon a formal contract and the Posts & Telegraphs department adopted the same form of contract with minor alterations.

On or about 1st April, 1943, the telephone system belonging to the Bengal Telephone Corporation Ltd. was completely taken over by the Government of India.

On or about the 5th July, 1945, the petitioner received a letter from the General Manager on the following terms:—

"This department offers you employment as a telephone operator on probation, during which time you will be required to attend the telephone school, Burrabazar Exchange, for three hours daily on a salary of Rs. 40/- per mensem.

Provided your period of probation is satisfactory, you will, when a vacancy occurs, be appointed as a temporary operator on a salary of Rs. 70/- per mensem. Later, and on confirmation of your appointment, you will be placed in the scale of Rs. 70-10-140."

The petitioner accepted the offer and signed the application form on the 10th July 1945. One of the terms as set out in the application form was that during probation, the employment will be subject to twenty four hours' notice on either side, and that on acceptance, each probationer was to sign an agreement and would be subject to the terms of such agreement as regards notice etc.

As I understand this term, it means, that the petitioner would have to be on probation for a certain period until she was accepted as a full-fledged employee when a written agreement would be entered into and this written agreement would govern the employment. Until the written agreement was entered into,

the petitioner would be on probation and subject to twenty four hours' notice.

The petitioner continued on probation until the 1st of January, 1946, when a written agreement was entered into. The agreement which is signed by the General Manager, Indian Posts & Telegraphs Department, Telephones, Calcutta District, recite that the Governor General had engaged the petitioner as operator and the petitioner agreed to serve the Governor General as operator in the Calcutta Telephone District for the period of one year from the date of the agreement, and thereafter, unless and until the agreement should be determined in the manner laid down therein. It was laid down that the General Manager would be entitled to dismiss the operator forthwith if she failed to carry on her duties satisfactorily or committed any breach of agreement or infringed or refused to abide by the rules or any reasonable orders or absented herself without leave or was guilty of misconduct or committed anything to render herself unfit for the purpose of her duty. There is also the following term:—

"The General Manager, Telephones, Calcutta District, shall also be entitled, at any time during the currency of this agreement without assigning any reason therefor, to terminate the same by giving to the operator three calendar months' notice in writing or by paying the operator three months' salary in lieu of notice."

The agreement contained another clause to the following effect:—

"The Operator shall be and is hereby subject to all the rules and regulations of the Governor General for the time being relating to persons employed by the General Manager, Telephones, Calcutta District, and applicable to her employment for the time being and the operator shall be responsible for making and keeping herself acquainted from time to time with all such rules and regulations."

Reference has been made before me to a series of correspondence between the Government of India and the Director General of Posts & Telegraphs, dealing with the terms and con-

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ditions of service for employees of the late Bengal Telephone Corporation. It appears that as and from the 1st April 1946, all ex-employees of the company came under the rules applicable to the P. & T. Staff. I do not see, however, how this is relevant so far as the petitioner is concerned because she is not an ex-employee of the company, but was appointed under a contract with Government at a time when the Government had already taken over the Corporation.

On or about 9th March 1949, the petitioner was arrested under the Security Act. She was released on or about 30th June 1949 but re-arrested on or about 20th October 1949. She was suspended with effect from the 9th March, 1949.

On the 6th February 1950, notice was served upon the petitioner under rule 3 of the Civil Services (Safeguarding National Security) Rules. It was stated that she was reasonably suspected to be a member of the Communist Party of India, that she indulged in highly objectionable activities of such a nature as to raise grave doubts about her loyalty to the State, that she took active part in the preparation of a general strike and that she was liable to be compulsorily retired from service under Rule 3 of the said rules. She was asked to show cause why such action should not be taken against her.

It appears that an application was made to this Court, and pursuant to the orders of the Court, the petitioner was released on or about 23rd January 1951. On the 9th February, 1951, the order of suspension was withdrawn and the petitioner was re-instated to her former post of telephone operator.

On the 10th March 1952, the petitioner wrote a letter to the General Manager stating that although she was under the impression that she was a permanent employee, her name appeared in the register maintained for temporary employees and that she was granted leave only on average pay. The petitioner wanted the position to be clarified.

On the 20th March 1952, the petitioner received a letter from the Engineer-in-charge, Calcutta Telephones to the effect that she had not yet become permanent.

On the 20th June 1952, the petitioner received a notice signed by the Superintending Engineer to the following effect:—

"The Services of Mrs. Anima Munshi, temporary telephone operator, Bank Exchange, are hereby terminated with effect from the forenoon of 21st June 1952. As per terms and conditions of her services, she will be paid one month's pay in lieu of due notice."

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The present rule was issued on the 28th January, 1953 calling upon the respondents to show cause why an order in the nature of a Writ of Mandamus should not be issued directing the said respondents to forbear from giving effect to the order or dismissal of the applicant and/or why the same should not be withdrawn or rescinded.

I shall, first of all, state the respective view points of the parties. On behalf of the petitioner, it is stated that she was a permanent employee of the Government and governed by the rules which governed such employees. The agreement dated 1st January 1946 is admitted. She says, however, that the agreement was subject to all the rules and regulations framed by the Governor-General for the time being relating to persons employed by the General Manager, Telephones, Calcutta District, and as such, the general rules have become applicable in the matter of dismissal. Alternatively, she states that by reason of the conduct of the Government, her employment has been accepted as having the same incidences and subject to the same rules and regulations as govern the case of all permanent employees by the Posts & Telegraphs Department of the Central Government.

It is then argued that under the rules applicable to civil servants and also in accordance with Article 311 of the Constitution, she could only be dismissed by an authority not subordinate to the appointing authority, and secondly, before dismissal it was incumbent upon the respondents to give her a reasonable opportunity of defending herself by formulating charges and making a proper departmental enquiry and indicating the punishment that was sought to be imposed.

On behalf of the respondents it is emphatically stated that the petitioner's service is based on the agreement dated 1st

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January 1946 and nothing else. The respondents do not appear to be certain as to whether it is a temporary or a permanent employment. At a certain stage the authorities were at pains to establish that the petitioner was in the temporary employment of the Government. As a matter of fact, the notice dated 20th June 1952 described her as a temporary telephone operator. One month's pay in lieu of notice is given, which would be appropriate in the case of a temporary servant governed by the Central Civil Services (Temporary Service) Rules 1949. At the hearing of this application, however, the respondents have taken up the position that argued that the petitioner is at best entitled to three calendar months' notice or salary in lieu thereof. It is argued that if this be so, then dismissal upon one month's notice or pay in lieu thereof might at best be a breach of contract for which the petitioner has her proper remedy elsewhere, but in any event, she is not entitled to the safeguards imposed by the rules or Article 311.

So far as the nature of her employment is concerned I have come to the conclusion that she was a permanent employee holding service under a written contract of employment. As I read the form which the petitioner was asked to fill up for the purposes of making the application, it contemplated a period of probation after which an agreement would be arrived at which would amount to confirmation. The petitioner served her period of probation and her services were confirmed and an agreement entered into. There is nothing in the agreement to show that it was a temporary employment. I have looked into the service records of the petitioner which were produced in Court. She has been treated therein as a permanent employee. It is said that this was done by mistake, but I am unable to accept this explanation. Her scale of pay, her provident fund—all go to show that she was in the permanent cadre.

In my opinion, the petitioner held a permanent post as a telephone operator under a service contract, namely the agreement dated 1st January 1946. In view of this finding it is unnecessary to go into the very complicated question as to whether if it were otherwise, the petitioner's application should not be dismissed in limine because if there is no contract which fulfils the conditions of Section 175 (3) of the Government of India

Act corresponding to Article 299 of the Constitution, then the petitioner cannot maintain an application at all.

Mr. De argues that assuming that this agreement governed the contract between the parties, the entire body of rules applicable to civil servants was attracted by the omnibus clause in the agreement which has been set out above. The position, however, is not so simple as that. Here, there is a service contract and there is a specific provision therein which governs the mode of termination of service.

I am not concerned with dismissal or removal from service by way of punishment because more difficult questions arise in respect thereof. What has taken place here is a mere termination of the services of the petitioner and must be taken to be under clause 7 of the agreement. Since there are terms in this agreement which govern matters relating to termination of service, the question is whether they supersede or prevent the operation of the ordinary rules whereby the services of a civil servant can be terminated. In my opinion, that must be so. Where there is a contract of service and service has to be terminated in terms thereof, the general rules regarding the removal from service or dismissal applicable to civil servants do not apply.

The position, therefore, is that the authorities were entitled to terminate the service of the petitioner under clause 7 of the contract. Under that clause, three months' notice had to be given or salary in lieu thereof. The respondents, however, gave one month's notice and offered to pay one month's salary. If this amounted to a violation of the terms of the service contract, it is at best a breach of contract for which the petitioner's proper remedy is to bring an action for damages.

This view of the matter also disposes of the question as to whether the petitioner is entitled to challenge the dismissal as contravening the provisions of Article 311(2) of the Constitution. Since the termination of service is to be made in terms of a service agreement, the provisions of Article 311(2) does not apply and the formalities mentioned therein, namely giving her a reasonable opportunity of showing cause etc. are not necessary.

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This is now the settled law, as decided in *Satish Chandra Anand v. The Union of India* (1), and *Shyam Lal v. The State of Uttar Pradesh* (2).

Mr. De next takes the point that the order of dismissal dated the 20th June 1952 is bad because it contravenes the provisions Article 311(1) of the Constitution. That Article runs as follows:—

“No person who is a member of a civil service of the Union or an All-India Service or a civil service of the State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.”

The contract of service dated 1st January 1946 is signed by the General Manager, Indian P. & T. Department Telephones, Calcutta District. The termination of service was effected by a letter dated the 20th June 1952, which is signed by the Superintending Engineer. It is not disputed that the Superintending Engineer is a official subordinate to the General Manager. I have before me an affidavit affirmed by Mr. H. R. Thadani the General Manager who says that the appointing authority was at all times the Superintending Engineer and not the General Manager. The Superintending Engineer, Mr. Collershow has affirmed an affidavit stating that the Superintending Engineer was at all material times the appointing authority in respect of telephone operators in the Calcutta Telephone District. He refers to notification No. 7/56/50 Ests. Issued by the Ministry of Home Affairs published in the Gazette of India on the 28th April 1951. That notification states that the President of India, under powers conferred by Article 302 of the constitution was making certain amendments in the rules published in February 1932. According to this notification, the appointing authority of Telephone operators is the Executive Engineer. The question therefore arises as to whether the appointing authority, so far as the petitioner is concerned, is the General Manager who actually appointed her in January 1946, or the Superintending Engineer who has become the appointing authority since April 1951. I think however that for purposes of this

(1) (1953) A.I.R. (S.C.) 250. (2) (1954) S.C.A. 476.

application, this abstruse point need not be decided, as the issue raised can be disposed of upon a simple point: Article 311(1) only applies where there is a "Removal" or a "Dismissal." In the instant case, the petitioner's service has been terminated and it can only be done in accordance with the terms of her contract. Is such a termination of service, either a "Removal" or a "Dismissal"?

This point was considered in a recent decision of the Supreme Court, *Shyam Lal v. The State of Uttar Pradesh* (1), Das, J. stated as follows:

"In England the rule was well established from very early times that public offices were held at the pleasure of the Crown. The English constitutional theory was that the King could do no wrong and accordingly the services of civil servant could be terminated without assigning any reason and no action could be maintained in the King's Courts for damages for wrongful dismissal. This principal appears to have been applied even to the servants of the East India Company and certainly to the civil servants after the British Crown took over the territories and the administration thereof from the East India Company. This state of affairs continued until 1919 when section 96-B of the Government of India Act 1919, while maintaining that the tenure was during his Majesty's pleasure, introduced a minor restriction on this power of dismissal.

As already stated, sub-section (4) of this section validated and confirmed the then existing rules and sub-section (2) gave power to the Secretary of State for India in Council to make rules for regulating the classification of the civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. In exercise of this power the Secretary of state for India in Council framed certain rules in December 1920 which with subsequent modifications were published on the 27th May, 1930, as The Civil Services (Classification, Control and Appeal) Rules.

(1) (1954) S.C.A. 476.

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Rule 49 provides:

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"49. The following penalties may, for good and sufficient reason and as hereinafter provided be imposed upon members of the services, comprised in any of the classes (1) to (5) specified in rule 14, namely:

(vi) Removal from the civil service of the Crown which does not disqualify from future employment.

(vii) Dismissal from the civil service of the crown, which ordinarily disqualifies from future employment.

(Explanation: The termination of employment—

(a) ×

(b) ×

(c) of a person engaged under a contract in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule or of rule 55).

Then came the Government of India Act 1935. Section 240 is important for our purpose. The relevant portion of that section were as follows:

"240. (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India or holds any civil post under the Crown in India, holds office during his Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

Finally we have our Constitution—

Article 311(1) reproduces the provisions of section 240 (2) of the Government of India Act 1935. Removal like dismissal no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal. A reference to the Explanation to

Act corresponding to Article 299 of the Constitution, then the petitioner cannot maintain an application at all.

Mr. De argues that assuming that this agreement governed contract between the parties, the entire body of rules applicable to civil servants was attracted by the omnibus clause in the agreement which has been set out above. The position, however, is not so simple as that. Here, there is a service contract and there is a specific provision therein which governs the mode of termination of service.

I am not concerned with dismissal or removal from service by way of punishment because more difficult questions arose in respect thereof. What has taken place here is a mere termination of the services of the petitioner and must be taken to be under clause 7 of the agreement. Since there are terms in this agreement which govern matters relating to termination of service, the question is whether they supersede or stating that the Superintending Engineer was at all material times the appointing authority in respect of telephone operators in the Calcutta Telephone District. He refers to notification No. 7/56/50 Ests. Issued by the Ministry of Home Affairs published in the Gazette of India on the 28th April 1951. That notification states that the President of India, under powers conferred by Article 302 of the constitution was making certain amendments in the rules published in February 1932. According to this notification, the appointing authority, so far as the petitioner is concerned, is the General Manager who actually appointed her in January 1946, or the Superintending Engineer who has become the appointing authority since April 1951. I think however that for purposes of this application, this abstruse point need not be decided, as the issue raised can be disposed of upon a simple point. Article 311 (1) only applies where there is a "Removal" or a "Dismissal." In the instant case, the petitioner's service has been terminated and it can only be done in accordance with the terms of her contract. Is such a termination of service, either a "Removal" or a "Dismissal"?

This point was considered in a recent decision of the Supreme Court, *Shyam Lal v. The State of Uttar Pradesh* (1), Das J., stated as follows:—

(1) (1954) S.C.A. 476.

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"In England the rule was well established from very early times that public offices were held at the pleasure of the Crown. The English constitutional theory was that the King could do no wrong and accordingly the services of civil servant could be terminated without assigning any reason and no action could be maintained in the King's Courts for damages for wrongful dismissal. This principle appears to have been applied even to the servants of the East India Company and certain to the civil servants after the British Crown took over the territories and the administration thereof from the East India Company. This state of affairs continued until 1919 when section 96-B of the Government of India Act 1919, while maintaining that the tenure was during his Majesty's pleasure, introduced a minor restriction on this power of dismissal.

As already stated, sub-section (4) of this section validated and confirmed then existing rules and sub-section (2) gave power to the Secretary of State for India in Council to make rules for regulating the classification of the civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. In exercise of this power the Secretary of state for India in Council framed certain rules in December 1920 which with subsequent modifications were published on the 27th May 1930 as The Civil Services (Classification, Control and Appeal) Rules."

Prevent the operation of the ordinary rules whereby the services of a civil servant can be terminated. In my opinion, that must be so. Where there is a contract of service and service has to be terminated in terms thereof, the general rules regarding the removal from service or dismissal applicable to civil servants do not apply.

The position, therefore, is that the authorities were entitled to terminate the service of the petitioner under clause 7 of the contract. Under that clause, three months' notice had to be given or salary in lieu thereof. The respondents, however, gave one month's notice and offered to pay one month's salary. If

this amounted to a violation of the terms of the service contract, it is at least a breach of contract for which the petitioner's proper remedy is to bring an action for damages.

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This view of the matter also disposes of the question as to whether the petitioner is entitled to challenge the dismissal as contravening the provisions of Article 311 (2) of the Constitution. Since the termination of service is to be made in terms of a service agreement, the provisions of Article 311 (2) does not apply and the formalities mentioned therein, namely giving her a reasonable opportunity of showing cause etc. are not necessary. This is now the settled law, as decided in *Satish Chandra Anand v. The Union of India* (1), and *Shyam Lal v. The State of Uttar Pradesh* (2).

Mr. De next takes the point that the order of dismissal dated the 20th June 1952 is bad because it contravenes the provisions Article 311 (1) of the Constitution. That Article runs as follows:—

“No person who is a member of a civil service of the Union or an All-India Service or a civil service of the State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.”

The contract of service dated 1st January 1946 is signed by the General Manager, Indian P. & T. Department Telephones, Calcutta District. The termination of service was effected by a letter dated the 20th June 1952, which is signed by the Superintending Engineer. It is not disputed that the Superintending Engineer is a official subordinate to the General Manager. I have before me an affidavit Rule 49 provides:

“49. The following penalties may, for good and sufficient reason and as hereinafter provided be imposed upon members of the services, comprised in any of the classes (1) to (5): specified in rule 14, namely:

(1) (1953) A.I.R. (S.C.) 250.

(2) (1954) S.C.A. 476.

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(vi) Removal from the civil service of the Crown which does not disqualify from future employment.

(vii) Dismissal from the civil service of the Crown, which ordinarily disqualifies from future employment.
(Explanation: The termination of employment—

(a) ×

(b) ×

(c) Of a person engaged under a contract in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule or of rule 55)

Then came the Government of India Act 1935. Section 240 is important for our purpose. The relevant portion of that section were as follows:

"240 (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India or holds any civil post under the Crown in India, holds office during his Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

Finally, we have our Constitution:

Article 311 (1) reproduces the provisions of section 240 (2) of the Government of India Act 1935 Removal like dismissal no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal. A reference to the Explanation to

rule 49 quoted above will show that several kinds of termination of service do not amount to removal or dismissal. Our recent decision in *Satish Chandra Anand v. The Union of India* (1), fully supports the conclusion that Article 311 does not apply to all cases of termination of service. That was a case of a contract for temporary service being terminated notice under one of the clauses of the Contract itself and fell within clause (c) of the Explanation to rule 49 and Article 311 was held by this Court not to have any application to the case."

The case here is exactly similar and falls within clause (e) of the Explanation to rule 49. There is a contract of service here under which a service can be terminated upon three months' notice. Termination of service by a notice cannot therefore be treated here either as dismissal or removal from service and does not attract the provisions of Article 311. It is the case of the petitioner that the Superintending Engineer could not in law represent the Government of India for purposes of terminating the services of the petitioner, she can file a suit for a declaration that she is still in the employ of Government. Application under 226 will not lie and no constitutional provision has been infringed.

The result is that the points taken have failed and the application must be dismissed. The Rule is discharged. The respondents were manifestly in error in considering the petitioner to be a temporary employee and taking all matters into consideration, I make no order as to costs.

D. P. Sarbadhikary & Co.: Solicitor for the Applicant.

S. K. Mandal: Solicitor for the Respondent.

Application dismissed.

(1) (1953) A.I.R. (S.C.) 250.

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ORIGINAL CIVIL:

Before Mr. Justice G. K. Mitter.

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Calcutta Municipal Act, Sections 392 and 394.—Stalls in Municipal Market—Allottee of such a stall, whether a mere licensee or he acquires an interest in the immoveable property—Whether such an allottee possesses an interest in the title of the stall.

Where a suit was brought for adjudicating upon the validity or otherwise of the cancellation of licences in respect of two stalls in a Corporation Municipal market, situate outside the jurisdiction of the High Court, at Calcutta, and the issue was whether an allottee of a stall in the Municipal market was a mere licensee in respect of the stall without any interest in the title of the stall.

Held: That in view of the facts that the stall holder has to pay a considerable sum of money before he can be allotted the stall and that he has to be given 7 days' notice before he can be called upon to vacate or quit the stall, the stall holder must be held to be in exclusive possession of the stall so long as he complies with the conditions laid down by the Calcutta Municipal Act, and any other persons found upon the stall will be considered trespasser, and as such a suit regarding the title of a stall is a suit for land.

Suit over the ownership of certain stalls in a Municipal Market in Calcutta.

The material facts will appear from the judgment.

A. K. Sen and S. Roy for the Plaintiff.

Subimal Roy and S. C. Deb for the Defendants.

The judgment of the Court was as follows:—

J. Das Gupta, Advocate for the Corporation of Calcutta.

G. K. Mitter, J.:—One Srinath Das was the own of two businesses in sweetmeat at stalls Nos. 10 and 12, G-Block, Lansdowne Market Calcutta and at 140/A, Russa Road, Calcutta, outside the jurisdiction of this Court. Some years ago the

* Original Side Suit No. 3003 of 1949.

the Corporation of Calcutta, one of the defendants in this suit, allotted the two aforesaid stalls at Lansdowne Market to the said Srinath Das, who also held for several years a licence in respect of the said businesses under the Calcutta Municipal Act. The defendant Devi Shaw used to be employed by the said Srinath Das in this business at Lansdowne Market.

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Srinath Das, who originally filed the suit, is dead, and his heirs and legal representatives have been brought on the record as plaintiffs in this suit after his death. The case of the plaintiffs is that Srinath Das was away at his native place at Mathura in or about June, 1948 and on coming back to Calcutta in September, 1948 he was refused access to the shop at Lansdowne Market by the defendant Devi Shaw. The plaintiffs allege that the licence of the deceased Srinath Das had been revoked and cancelled by the Chief Executive Officer, Corporation of Calcutta on the pretended ground of Srinath Das' having sublet the said stalls in Lansdowne Market and thereby contravened the terms and conditions of the licence granted to him. The plaintiffs further complain of certain orders passed by the Corporation of Calcutta on the 8th September, 1948, 20th December, 1948, 8th January, 1949 and 5th March, 1949. These orders relate to the revocation or cancellation of the licence of Srinath Das in respect of the stalls at Lansdowne Market and the allotment of the said stalls to the defendant Devi Shaw. These orders, according to the plaintiffs, were passed by the defendant Corporation of Calcutta at its principal office within the jurisdiction of this Court. The plaintiffs also contend that the deceased Srinath Das had never agreed to transfer the stalls at Lansdowne Market or any portion thereof to the defendant Devi Shaw and that the deed of agreement, dated the 15th September, 1945 set up by the defendant Devi Shaw as affecting to transfer the aforesaid stalls at the Lansdown Market, is not binding on the plaintiffs and should be adjudged void, and delivered up for cancellation. According to the plaintiffs all the said orders of the Corporation of Calcutta mentioned above were made malafide and in collusion and conspiracy with the defendant Devi Shaw. The plaintiffs charge that the defendant Devi Shaw unlawfully and in breach of faith and confidence reposed in him by the deceased Srinath Das completely ousted the said Srinath Das and usurped all books, papers, accounts,

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vouchers of the said Srinath Das in respect of the aforesaid stalls at Lansdowne Market and thereby deprived him of all documents of title. The plaintiffs submit that they are still the owners of the business at the aforesaid stalls and as the defendants are denying and or are interested to deny their right, title and interested in the said business they are entitled to a declaration from this court upholding their right in respect thereof. They also claim to be the owners of the licence in respect of the aforesaid stalls. The plaintiffs further state that they have suffered loss and damages by reason of usurpation by the defendant Devi Shaw of the business of Srinath Das at Lansdowne Market and by reason of the pretended cancellation and the revocation of the licence granted to the deceased Srinath Das. They also claim damages to the extent of Rs. 20,000/- being the value of the stock-in-trade and assets of the business alleged to have been wrongfully converted by the defendant Devi Shaw. By the plaint as originally filed the plaintiffs asked for a decree for (a) a declaration that the plaintiffs were the owners of the business stalls Nos. 10 and 12, G-Block, Lansdown Market Calcutta, (b) a declaration that the plaintiffs were entitled to be the licensee in respect of the aforesaid stalls and that the pretended cancellation and revocation of the licence granted to Srinath Das was unlawful, (c) a declaration that the pretended agreement dated the 15th September, 1945 was void and delivery up of the alleged agreement for cancellation, (d) loss and damages and loss of profits assessed at Rs. 200/- per month of alternatively accounts of the said business and enquiry there into and payment of the sum found due, (e) stock-in-trade of the assets of the said business valued at Rs. 20,000/- and other reliefs. The suit was filed on the 8th August, 1949. After the death of Srinath Das on the 2nd January, 1945 the plaint was amended by the addition of a new paragraph 21 and other amendments necessitated by the death of the said Srinath Das, both in the body of the plaint and in the Cause Title and in the reliefs asked for.

Thereafter, there was a further amendment, by this paragraph 9 of the plaint was further altered by the addition of the following: "The defendant Devi Shaw has, further, by mis-using his fiduciary position, wrongfully procured from the defendant Corporation of Calcutta licences for the said stalls in his

own name. The defendant Devi Shaw is liable to hold the said licences and the said stalls in trust for the plaintiff." The prayer portion was also amended by the addition of a new prayer (b) (1) which reads as follows:—"a declaration, if necessary, that the defendant Devi Shaw is holding the said stalls and the licences in respect thereof in trust for the plaintiff." The defendants Devi Shaw and the Corporation of Calcutta have filed separate written statements. The defendant Shaw denies that Srinath Das, was the owner of the two businesses or either of them, his contention being that he was the absolute owner of the businesses from 1943. He also denies that he was a servant of the plaintiff Srinath Das, as untruly alleged in the plaint. The case made by Devi Shaw in his written statement is that the deceased Srinath Das had sublet the said stalls to him in or about 1943, and that he had been carrying on the confectionery business at the stalls in Lansdowne Market ever since that time. We states further that he was called upon by the defendant Corporation of Calcutta to vacate the stalls and upon his application for allotment of the same to him the stalls were so allotted by the Corporation of Calcutta on payment of Rs. 3,000/- as initial rent. In paragraph 8 of his written statement Devi Shaw makes a positive case that in or about 1943, Srinath Das sublet or leased the said two stalls to him on certain terms and conditions, viz., (1) that the defendant Devi Shaw would pay the daily rent of the said two stalls payable under the licence to the Corporation of Calcutta (2) that the plaintiff Srinath Das would continue to apply for renewal of the said licence from the Corporation of Calcutta (3) that the defendant Shaw would pay to the plaintiff Rs. 3/- per day as rent of the said two stalls. With regard to the agreement for the transfer of the two stalls in 1945 the defendant Devi Shaw's case is that the agreement was validly entered into and is binding on the plaintiff Srinath Das and that thereby the rent payable was increased to Rs. 4/- per day. The confectionery business, according to Devi Shaw, belongs entirely to him and was started with his money and that the plaintiffs have no interest therein. Devi Shaw also denies the plaintiffs right to claim any damages or the value of the stock-in-trade. Among other defences taken by him Devi Shaw contends that this Court has no jurisdiction to try this suit. The defendant Corporation of Calcutta, by its written statement, contends that the orders contained in the plaint were all validly

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and legally made, that there was no collusion between the Corporation of Calcutta and the defendant Shaw, that the plaintiff Srinath Das was called upon to produce his account books for various years and to show cause why his licence should not be cancelled, that the said plaintiff did not avail himself of the said opportunities whereupon the licence granted to him was cancelled. The Corporation also states that the Chief Executive Officer, on due consideration, duly re-allotted the stall to the defendant Devi Shaw upon payment of Rs. 3,000/- as initial rent and Rs. 4/- as daily rent from the 9th September, 1948. The Corporation raises various technical defences, viz., that the suit was barred by limitation, that it was not maintainable against the Corporation of Calcutta under the provisions of the Calcutta Municipal Act, 1923 etc.

... The Corporation states further that the stalls Nos. 10 and 12 of Block C of the Lansdown Market were allotted to the plaintiff several years ago on a permanent basis for carrying on business in the sale of sweetmeat subject to the terms and conditions of a licence granted to him by the Corporation under Section 394 of the said Market found that the said stalls were in the actual occupation of the defendant No. 1 and the plaintiff was thereupon required to show cause why his licence should not be cancelled for subletting the said stalls without the permission of the Corporation. The plaintiff neither appeared before the Superintendent nor did he show cause pursuant to the notice but the defendant Devi Shaw sent in a reply stating that he was a servant of the plaintiff managing the said stalls on behalf of the plaintiff. In the absence of convincing proof of subletting, the plaintiff Srinath Das' licence was renewed in April, 1948. Thereafter further enquiry was instituted in August, 1948. The plaintiff did not appear nor did he show cause. The defendant Devi Shaw appeared and submitted that the stalls had been sublet to him. After full consideration of the matter the plaintiff's licence in respect of the stalls was cancelled by an order dated the 9th September, 1948 which order was duly communicated to the plaintiff. The plaintiff Srinath Das was further called upon to establish to the satisfaction of the First Deputy Executive Officer of the Corporation of Calcutta that he was still in occupation of the said stall and the owner of the business carried on in the Lansdowne Market, and

on the plaintiff's failure to do so the matter was referred to the Chief Executive Officer directed that if the plaintiff did not satisfy the First Deputy Executive Officer by the 4th January, 1949, the order for cancellation of the plaintiff's licence would be given effect to and the stalls be reallocated. The plaintiff Srinath Das failed and neglected to satisfy the Deputy Executive Officer on the points mentioned and the order for cancellation of his licence was thereupon confirmed. Subsequent thereto on the defendant Devi Shaw's application for allotment of the said stalls the Chief Executive Officer reallocated the stalls to him by an order dated the 25th March, 1949. Various documents have been disclosed by the parties in this case but no agreed brief of documents were put in and the following issues were settled at the hearing of the suit.

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1. Did Srinath Das sublet the stall to Devi Shaw?
2. Is the plaintiff the owner of the business carried on in the stalls in suit?
3. Was the defendant Devi Shaw a servant of the plaintiff?
4. Did Devi Shaw wrongfully procure the licence in his own name as alleged in paragraph 9 of the plaint?
5. Are the orders mentioned in paragraph 10 of the plaint unlawful as alleged therein? Is the plaintiff bound by the said orders?
6. Has this Court Jurisdiction to try this suit?
7. Is this suit barred by limitation?
8. To what relief, if any, is the plaintiff entitled?
9. Is the suit maintainable with regard to prayer (b1) in view of the fact that no leave was obtained under clause 12 at the time of the amendment?

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Counsel for the plaintiff Mr. Sen suggested that I should give my decision on the question of jurisdiction first, and this course was also acceptable to counsel for the other parties. Counsel for the defendant Devi Shaw contended that the suit was not maintainable with regard to prayer (b1) in view of the fact that no leave had been obtained under clause 12 of the Letters Patent at the time of the second amendment of the plaint making additions to paragraph 9 of the plaint and inserting the new prayer (b1) already mentioned and counsel relied on the decision of Sinha, J. in the case of *Kshitish Kumar Shome v. The State of Bihar* (1). This case is an authority for the proposition that an amendment which necessitates the granting of fresh leave under clause 12 of the Letters Patent should not be allowed inasmuch as such leave can only be granted at the time of the institution of the suit. The learned Judge, of course, visualised a case where such leave could be granted, viz., the case where a new party is sought to be brought in by reason of the amendment. But the judgment really does not consider the question as to what would be the effect if amendment has already been allowed and no exception taken thereto at the time when the application for amendment was made. This point is, however, covered by the decision of Gentle, J. in the case of *Barasat Basirhat Light Railway Company v. The District Board of 24 Parganas* (2), a judgment which is referred to in the case of *Kshitish Kumar Shome v. The State of Bihar* (1). The case of *Barasat Basirhat Light Railway Company's Case* (2). In this case the railway company filed a suit against the District Board of 24 Parganas claiming certain moneys due under an agreement. After the institution of the suit and as a matter of fact during the progress of the hearing thereof, it was discovered that the agreement was not binding on the District Board by reason of the absence of certain formalities. An application was then made for amendment of the plaint by the addition of claims under section 65 and section 70 of the Indian Contract Act. The learned Judge allowed the application and gave the defendant an opportunity to file an additional written statement. It appears from the judgment of Gentle J. (see at P. 23) that "After the conclusion of all argu-

(1) (1953) 91 C.L.J. 279.

(2) (1946) A.I.R. Calc 23.

ments referable to the several claims and the matters arising out of and in connection therewith, objection was taken on behalf of the Board to the jurisdiction of the Court in respect of the claims made in amendment in the plaint. "At the time when the question of amendment arose and when leave was given on the 17th November, 1943, for the amendment to be made, the question of jurisdiction was not raised; this took place on the 24th November. The learned Judge held "jurisdiction which the court does not possess cannot be conferred by a party postponing to take the objection and unless there is jurisdiction in the Court, it has none to exercise." The learned Judge went on to observe "Jurisdiction is conferred to receive, try, and determine suits provided the leave of the Court is previously obtained when the cause of action arises in part within the territorial limit. Leave must be obtained before the suit can be received. In *Rampurab Samruthroy v. Premsukh Chandamal* (1). It was held that the grant of leave is a judicial act relating solely to the cause of action set forth in the plaint at the time it was obtained, if affords the very foundation for jurisdiction and it is not available to confer jurisdiction in respect of a different cause of action which was not considered at the time, and subsequently the plaint cannot be amended so as to alter the cause of action, the Court cannot try a different cause of action save in another suit. In *Motilal Tribhovandas v. Shankerlal Chhaganlal* (2), it was held that when a suit was instituted with leave under clause 12 by several persons as partners and by amendment of the plaint was converted into a suit by only one of them, the cause of action is altered and does not lie in the absence of fresh leave." The learned Judge observed further "My attention was not called to the authorities and the question of leave being required in respect of the amendment was not raised when I granted leave to amend the plaint. But this omission and the grant of leave to amend the plaint cannot confer upon the Court Jurisdiction which it does not possess." Mr. Sen, arguing on behalf of the plaintiff, contended that such a proposition would work great hardship on the plaintiff because he would thereby be deprived of amending his plaint under the provisions of the Civil Procedure Code. I agree that

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(1) (1890) I.L.R. 15 Bom. 93.

(2) (1939) A.I.R. Bom. 345.

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hardship may be caused to the plaintiff in these circumstances but I see no reason why I should differ from the judgment of Gentle, J. which I have quoted as also from the judgment of Kania, J. of the Bombay High Court in *Motilal Tribhovandas v. Shankerlal Chhaganlal* (1). Without leave under clause 12 of the Letters Patent such a suit could not be entertained at all by this Court, and a person, who seeks to take the advantage of this provision of law, should not be heard to complain, if through his own default, he omitted to include a cause of action which was available to him at the time of the instituted of the suit, neither is there any substance in Mr. Sen's contention that once leave is given the Court has "received the suit" and has "to try and determine" the same although by amendment the suit may have suffered a law change. Once the cause of action is altered or added to, it cannot, in my opinion, be said that the reception of the suit continues to be proper without the grant of fresh leave.

The original plaintiff Srinath Das claimed to be the allottee of two stalls in Lansdowne Market. It cannot be doubted that these stalls by themselves are immoveable properties. The terms of allotment are not to be found in any document which has been disclosed but it is asserted by the parties that a considerable amount of money had to be paid for such allotment. The licence which was granted to Devi Shaw in the year 1949, has been marked as an exhibit in this case and it was agreed that the terms of the previous licences were the same. This licence was granted under section 394 (1) of Bengal Act III of 1923. It read as follows:

"The Corporation of Calcutta hereby grants unto Debi Prosad Shaw this licence on payment of Daily Rent under section 401 of the Calcutta Municipal Act, at the rate of Rs. 4/- per day during the month of January 1950 for occupying stalls Nos. 10 and 12, Block No. G and for selling or exposing for sale sweetmeats subject to the conditions in force in respect of Municipal Markets, and those specifically mentioned on the back.

(1) (1939) A.I.R. Bom. 845.

This licence shall be deemed to be a licence for the days for which the daily rent is paid in advance as per receipt thereunder."

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Various terms and conditions are to be found printed on the reverse of this licence. The important terms being:

(1) That no change in the nature of business will be made by the stall holder without written sanction being first obtained from the Corporation in that behalf. G. K. Mitter, J.

(2) That no stall holder shall sublet the use of the stall or any portion hereof or transfer his title, interest or any portion of interest in the business conducted in the stall, or admit or discharge any party in business without special sanction being first obtained from the Corporation in that behalf.

(3) That the daily rent for the stall shall be paid daily in advance before 10 A.M. every day.

(4) That the licensee shall pay in addition to the daily rent the amount due for electric charges (Additional rent) for the month within the month.

(5) That the stall-holder shall be bound to quit and make over peaceful possession of the stall within 7 days from the service of a written notice to that effect by the Corporation.

(6) That the stall holder shall be bound to comply with the directions and orders of the Corporation as may be given from time to time, and with the provisions of the Municipal Act and the Rules and Regulations and Bye-Laws made thereunder which are now in force or may hereafter come into force in respect of Municipal Markets.

(7) The relevant provisions governing in issue of licence under the Calcutta Municipal Act in respect of markets are to be found in Chapter XXVII of the Calcutta Municipal Act of 1923. The material provisions are as follows:—

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Section 392 (1) (b):—The Corporation may from time to time build and maintain such Municipal markets, Municipal slaughter houses and Municipal stock yards and such stalls, shops, sheds, etc., for the use of persons carrying on terms or business, in or frequenting, such markets, slaughter houses or stock yards, and provide and maintain in such Municipal markets such buildings, places, machines and correct weights, scales and measures for weighing and measuring goods sold therein, as they may think fit.

Section 394 (1):—No person shall, without a licence from the Corporation, sell or expose for sale any animal or article in any Municipal market:

Provided that no fee shall be charged for such licence.

Section 401:—The Corporation may—

(a) charge such stallages, rents and fees—

- (i) for the occupation or use of any stall, shop standing, shed or pen in a Municipal market Municipal slaughter house or Municipal stock yard,
- (ii) for right to expose goods for sale in a Municipal market.

Section 403 (1):—The Corporation, after giving the parties concerned an opportunity of being heard may

- (c) determine any lease or tenure, which such person may have in any such stall shop, standing, shed, pen or place.

These sections show that the Corporation may lease out or create a tenure *inter alia* in stalls in the Municipal markets and charge rents for the occupations or use of any such stalls as also for the right to expose goods for sale. The terms of the licence which I have set out above shows that rent was being charged by

the Corporation of Calcutta for the occupation of the stalls and for selling or exposing for sale sweetmeats in the said stalls, the consolidate amount being fixed at Rs. 4/- per day. The plaintiffs complain in this suit is not only that Srinath Das was the grantee of a licence for a confectioner's business and that Devi Shaw was his agent for the purpose of carrying on his business but that he was the allottee of two stalls wherein the business was being carried on. The plaintiffs complain not only of the revocation or cancellation of the licence issued to Srinath Das but also about the allotment of the stalls to Devi Shaw. They further complain that no transfer was effected at any time by Srinath Das to Devi Shaw of the stalls or any interest therein and that Devi Shaw had wrongfully usurped books and documents of the business and ousted the former plaintiff Srinath Das, that the orders of the Corporation are inoperative and not binding either on Srinath Das and on his heirs and legal representatives. Although the plaintiffs did not ask for any declaration of their title to the stalls directly they asked for a declaration that the agreement set up by the defendant Devi Shaw purporting to transfer the stalls should be declared void and should be delivered up for cancellation.

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Mr. Sen, appearing on behalf of the plaintiff contended that neither the plaintiffs nor Devi Shaw acquired any interest in any immoveable property and that by the licence they were only granted privileges for carrying on business in the stalls mentioned in the plaint, that they could not be said to be in exclusive occupation or possession of the stalls, that their user of the stalls was limited in that they could only occupy the stalls for certain hours in the day and in a manner consistent with the Calcutta Municipal Act and the Bye-Laws promulgated thereunder. He contended further that the position of the plaintiffs or the defendant Devi Shaw was merely that of a licensee with no interest in the immovable property. On the other hand, it was contended on behalf of the defendant Devi Shaw that although there might be restrictions as to the mode of user of these stalls the defendant Devi Shaw certainly had an interest in these stalls and that he was not a mere licensee. Reference was made to a passage in Mulla's Transfer of Property Act to the effect that a distinction between a lease and a licence showed that the licensee had to give up possession immediately when

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called upon to do so and was not entitled to any notice and that the licensee had no right to exclusive possession of the premises occupied by him. Mr. Sen on behalf of the plaintiff, referred me to the various sections of the Calcutta Municipal Act which I have dealt with and contended that the licence in this case could not be said to amount to an interest in land—at best, it merely amounted to a permission to expose goods for sale. He referred to a judgment reported in support of his contention the case being that of the *Secretary of State for India v. Karuna Kanta Chowdhury* (1). In this case a mela or fair was held yearly on lands included in the holdings of agricultural tenants, at a time when they were not used for agricultural purposes, by certain persons, called fakirs, who executed in favour of the Zemindar a kabuliati agreeing to pay an annual “sayari chandina jama” for the right to hold the fair. The fakirs gave the right to hold the fair to ijjardars who derived profits by levying tolls on sellers of cattle and other animals, at a certain rate per animal, from stall-keepers at so much per stall and from certain other persons frequenting the fair.

It was held that the profits were not paid by tenant to landlord, nor for the use and occupation of land, and, consequently were not rent, and did not fall within the definition of “annual value of land” in section 4 of the Cess Act, and that an assessment of cess made by the Collector on the basis of such profits was illegal and *ultra vires*.” Mookerjee J. observed in this case:

“The question, however, which requires examination in this case is, whether the profits of a mela which have been assessed by the Collector, do fall within the description of ‘annual value of land.’ The question would require an answer in the affirmative, if it is established that the profits constitute rent, either actually payable, or assessed as reasonably payable, by the tenants. The question would however require an answer in the negative, if the profits are not payable by either cultivating raiyats or by other persons in the actual use or occupation of the land. The decisive test, therefore, which has to be applied is,

(1) (1907) I.L.R. 35 Calc. 87.

whether the profits of the mela are rent payable by tenants to their landlord. . . . So far as the materials on the record go, they appear to indicate that these persons from whom money is collected are licensees and not lessees The most substantial contribution is made by persons who sell cattle, and the return filed by the ijaradars of the Fakirs shows that a toll is, under the name of rent, levied at the rate of 5 annas for each head of cattle sold. . . . The question, therefore, narrows down to this; Are the persons, who attend the fair with a view to sell various article of merchandise and who either occupy or set up stalls or booths, in any sense tenants, and can the sums paid by them to the ijaradars of the Fakirs be described as rent by any stretch of language? In my opinion, this question ought clearly to be answered in the negative. . . . The lands on which the fair was held during 20 days in the year, were all comprised in the holdings of agricultural tenants. The legal possession was in them. The Fakirs could not acquire by any grant from the landlord an interest in the lands in superssion or limitation of, or derogatory to, the interest of the cultivators. The zemindar granted them a right to hold the fair. This right they could not exercise, if the agricultural tenants objected. Substantially, they did not and could not acquire any right to the possession of the land. They could hold the fair only by consent or acquiescence of the cultivators. It is, therefore, impossible to say that they acquired any interest in the lands. Much less can it be said that the persons who attended the fair and sold animals, goods or articles of merchandise, were in any sense tenants of the ijaradars. They had obviously no interest in the land. They occupied or erected stalls or booths to store their goods and to sell them, and paid what was nothing more or less than a toll to the ijaradars of the Fakirs."

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The position of Srinath Das or Devi Shaw in this case cannot be compared to the Fakirs or Ijaradars in the case just now quoted from. The stall holder has to pay a considerable amount of money before he can be allotted this stall. The terms of the license itself show that he has to be given 7 days' notice before he can be called upon to quit or vacate the stall. So long as the

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stall holder complies with the conditions laid down by the Calcutta Municipal Act, in my opinion, he is in exclusive possession of the stall; for any trespass committed on the stall he could certainly bring an action against the trespasser. It may be that the stall holder can only use the stall for certain hours of the day or night and that he has to lock up the stall at night and is not allowed to sleep there. But even then it could not be said that he was not in exclusive possession of the stall—a fact which would give rise to an inference that he was not a mere licensee. In *Glenwood Lumber Company v. Phillips* (1), delivering judgment of the Judicial Committee Lord Davey observed at p. 408:

“If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.”

The nature of the right acquired by stall-holders and others came up for discussion in the case of *Mayor, Alderman and Councillor of the City of Westminster v. The Southern Railway Co. & Ors.* (2). There the question was whether certain premises at Victoria Station were Railway hereditament within the City of Westminster occupied for the purposes of the undertaking of the Southern Railway Company within the meaning of Section 1, Sub-Section 3, of the Railways Act, 1930. The Station Yard at Victoria Station belonging to the Southern Railway Company, was not enclosed within gates, but was at all times open to the public. Access to the main station was obtained by gates in Wilton Road, Hudson's Place and Buckingham Palace Road, as well as by the gates opening on the Station Yard. Those gates were closed by the Southern Railway Company's Servants at 12.45 A.M. every night and reopened by them at 4.30 A.M. for a short while and then closed again until 6 A.M. All the premises which were the subject-matter of the appeals were within the main station, and, when the gates were closed no one could get access to them but by the leave of the Company. The

(1) (1904) A.C. 405.

(2) (1936) A.C. 511.

shops and kiosks within the station opened at about 8 A.M. and closed at about 10 P.M. The structures and premises which were contained in the Railway Station and formed the subject matter of the appeals, could be divided roughly into 3 groups:

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(1) Premises of a permanent character not forming part of the building which was used by the Railway Company for its own purposes. Examples of this were a branch of the National Provincial Bank, and shops belonging to Messrs. Boots and others, and a tobacco stall.

(2) Book stalls and kiosks or small shops apparently resting on the floor of the Station by their own weight but connected by pipes and electrical connections provided by the company with parts of the Station.

(3) Show-cases containing goods exposed for purpose of advertisement.

Each of the premises was the subject of an agreement in writing between the Company and another party, called in some cases a tenant and in others a licensee. In all of these agreements certain rights were reserved to the Company. These could be divided into two main groups:

(1) Agreements in the form of demises.

(2) Agreements in the form of licences.

It was contended in the case of the bank's premises that they did not have the right to exclusive occupation or possession and that, therefore, they should be separately rated. Other features affecting the bank's occupancy upon which some reliance was placed were (1) that the Railway Company may decide upon the line of approach to be used by the bank and their employees in going to the premises; (2) that the Railway Company reserve certain rights for the purpose of controlling pipes and cables which run through, under or over the premises, and (3) that the bank must observe the by-laws and regulations as to the management of the station and the requirements of the station-master for the management of the station business and traffic. Lord Russell in delivering judgment on behalf of himself as also of the Master of the Rolls, stated that he could find nothing in these

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provisions inconsistent with the bank having and enjoying the exclusive occupation and possession of the bank premises for the purposes for which they were occupied, namely, for the purposes of a bank. In the opinion of Lord Russell the occupation of W. H. Smith & Son of the sites of their book stall was no different from the occupation of the site of the bank premises by the National provincial Bank Limited it was just as exclusive, just as paramount for rating purposes, just as permanent, and therefore just rateable. This conclusion was arrived at even on the face of the contention that the book stall employees, while on the railway premises, had to be under the control of the General Manager and the Station Master, that by laws had to be observed, that book stall servants were not to obstruct the railway company's servants, that no employee was to be retained contrary to the decisions of the General Manager of the railway and finally the railway company might exercise some control over what was sold at the book stalls. In my opinion even though the user of the stall may be subject to all the restrictions enumerated by Mr. Sen, a stall holder was still in exclusive possession or occupation of the stall and could not be said to be a mere licensee of the stall without any interest in the stall itself. The plaintiff himself asked for a declaration that he was not bound by a certain agreement to sublet the stall to Devi Shaw. Whether or not this agreement was genuine, any decision on this question would naturally, amount, in my opinion, to the adjudication of some title to the stall which must be held to partake of the nature of immoveable property. I was referred to the judgment of the Federal Court reported in Messrs. *Moolji Jaitha & Co. v. The Khandesh Spinning and Weaving Mills* (1). The learned judges did not come to the same conclusion in this particular case. But there seems to be no doubt that in the light of the tests mentioned by the learned judges this suit would be a suit for land. Kania C.J. observes at P. 865 of the Report—"It is sufficient to say that taking the suit as a whole one has to consider whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly. "According to Patanjali Sastri J.'s observation to be found at P. 885" suits for land would obviously cover claims for recovery of possession or control of

(1) (1950) F.C. Reports 849.

land and would connote also suits which primarily and substantially seek an adjudication upon title to immoveable property or a determination of any right or interest therein." The suit in the present case is not one which relates merely to the ownership of the licence but also includes an adjudication as to the rights of the parties to the stalls situated in Lansdowne Market outside the jurisdiction of this Court. According to the plaintiffs they were the allottee of the stall and although they does not directly ask for a declaration of title to this stall yet they contend that the allotment of the stall to Devi Shaw was wrongful and that they are not bound by the agreement of transfer of the stall to Devi Shaw. Clearly this would involve an adjudication of title to the stall itself.

Mr. Sen wanted to get round this difficulty by contending that his clients had asked for a declaration that the defendant Devi Shaw had misused his fiduciary position and wrongfully procured from the defendant Corporation, licences for the said stall in his own name and should, therefore, be declared to hold the said licences and the stalls in trust for the plaintiffs. Mr. Sen relied also on the observations of Kania C.J. and Patanjali Sastri in support of his contention that if the main object of the suit was to bring an erring agent to book and get the help of the Court to recompense the plaintiff for the loss and damage caused by the agent, then no matter that the adjudication of title to some land was involved, the suit could not be said to be a suit for land, and he contended further that even if the agent was not residing or carrying on business within the jurisdiction of this court such a prayer could be granted. In view, however, of my conclusion that the plaint has not been properly amended and that I cannot grant him the prayer mentioned in (b) of the prayer portion, and that I cannot uphold the amendment of paragraph 9 of the plaint, I do not think it necessary to go into that question.

In my opinion, the suit is a suit for land and as such this Court has no jurisdiction to entertain it. I, therefore, dismiss the suit, with costs.

Certified for two counsel.

S. C. Roy Chowdhury: Solicitor for the Applicant.

S. M. Chatterjee: Solicitor for the Respondent.

T. C. Mitter; Solicitor for the Corporation of Calcutta.

S.G.P.

Suit dismissed with costs.

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J. S. HUMPHREYS.*

Contract—Indian Contract Act, Section 74, scope of—Compensation for breach of contract—Reasonableness of the Compensation payable, onus of proof.

If there is no evidence showing that the figure named as compensation for breach of contract is unreasonable or excessive, the contract made by the parties estimating their damages is in itself evidence and if there is no other evidence of damages, then in certain cases, this evidence alone will be considered sufficient.

What Section 74 of the Contract Act means is that a party cannot get the full amount mentioned in the contract as a matter of absolute right or as a matter of course. But if the party proves that he has suffered damage to the extent of the full amount or that the Court considers, even without any proof, that the full amount is a reasonable compensation which can be awarded under the circumstances, the Court can award the full amount. One thing is however certain, that the party is entitled to get some amount, not exceeding the sum named, which the Court considers as reasonable compensation whether any actual loss or damages is proved to have been suffered by him or not.

Suit for Compensation for breach of contract.

The material facts will appear from the judgment.

T. K. Ghosh for the Plaintiff.

Sankar Ghosh for the Defendant.

The Judgment of the Court was as follows:

H. K. Bose, J.:—This is a suit for recovery of Rs. 5,500/- as damages for breach of a contract to deliver and instal a Soda Water Plant and for refund of Rs. 3,000/- paid as advance in

* Original Side Suit No. 1834 of 1952.

respect of the price of the said plaint and for other incidental reliefs.

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The plaintiffs case is that on or about the 11th December, 1951, the plaintiff agreed to purchase from the defendant one aerated soda water plant on terms and conditions as set out below:—

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1. The defendant would supply.

(a) One reconditioned Niggare Carbonator by Barnett & Foster Ltd. London, adapted for hand or power drive having a capacity of 70 dozen bottles per hour complete with pressure reducing valve and two 40 lbs. capacity cylinders filled with gas and two electro motors.

(b) One Sankey two head back pressure filling machine with one operator.

(c) One hand power crowning machine on stand.

(d) One double headed syruing machine with stainless steel syrup vessel.

(e) One bottle washing plant consisting of galvanised iron soaking tank electrically driven brushing machine and 12 jet rinsing machine.

2. The price of the complete plant would be Rs. 5,800/- including delivery and installation at premises No. 7, Kyd Street, Calcutta. The price would include replacement of parts for 12 months from the date of installation.

3. Rs. 3,000/- would be paid in advance towards the price.

4. Delivery and Installation of the plant was to be completed within two weeks from the 11th December, 1951 (i.e. date of acceptance of the offer).

The defendant also guaranteed that the plant would be in perfect working order and condition and would produce high class soda water.

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On the 11th December 1951 the plaintiff paid Rs. 3,000/- towards the price of the said plant in advance.

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On 23rd February 1952 the said Agreement was modified as follows:—

(a) The two electro motors were to be new.

(b) The galvanised iron tank of the washing machine was to be replaced by a new one.

(c) Delivery and installation of the plant was to be completed by 6th March 1952 and in the event of failure to give delivery on or before that date, the defendant would pay compensation at the rate of Rs. 50/- per day after 6th March 1952.

It was further agreed that the plaintiff would arrange a the adjustment of the plant before it was put into use, under the mechanic to complete the fabrication of the connection and for supervision and in accordance with the instruction of the defendants. The plaintiff was ready and willing to perform her part of the Agreement but the defendant failed to carry out his obligations under the contract. The defendant delivered only some parts of the plant, which were scraps and not of merchantable quality and were useless for the installation and working of the plant. The plant is still incomplete and has not been installed and is not working at all. The plaintiff offered to return the parts supplied, but the defendant has refused to take them back. By reason of the breach of contract on the part of the defendant, the plaintiff has suffered damages which is assessed at Rs. 5,500/-. The particulars of such damages are set out in paragraph 15 of the plaint. The plaintiff also claims refund of the advance of Rs. 3,000/-

In the written statement, the payment of Rs. 3,000/- is admitted. It is stated further that the defendant was all along ready and willing to perform his part of the contract but the defendant was prevented from performing his part of the contract by the wrongful conduct of the plaintiff's landlord and the plaintiff's business partner Mr. Agabeb. It is alleged that

time for performance was extended by mutual consent and the defendant performed his part of the contract within the extended time until he was hindered by the plaintiff not providing the Electricity. It is admitted that the defendant did not supply the following parts:—

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(a) The 40 lbs. Cylinders with Gas.

(b) One brushing machine complete.

(c) One $\frac{1}{4}$ H.P. Motor for brushing machine.

(d) Fittings for the plant and belting.

But it is stated that these articles were not necessary until the plant was installed, and electricity obtained. It is also stated that the value of the articles remaining undelivered would not exceed Rs. 500/-. It is further alleged that the plaintiff did not provide the mechanic and the plaintiff having accepted the goods cannot complain of their not being according to the contract. The defendant repudiates liability for damages and states that he is not liable to refund the sum of Rs. 3,000/-.

The following issues were raised at the hearing:—

1. Did the defendant commit any breach of the contract as alleged in paragraphs 1, 2, 5, and 6 of the plaint?

2. Was the time for performance of the contract extended by mutual consent as alleged in paragraph 4 of the written statement?

3. Is the provision for payment of compensation at Rs. 50/- per day of a penal nature or enforceable in law as pleaded in paragraph 5(d) of the plaint?

4. To what relief, if any, is the plaintiff entitled?

Mrs. Margaret Preston, the plaintiff has deposed before this Court. She states that she was introduced to the defendant by

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her brother Mr. Thaddeus towards the end of 1951 in connection with the purchaser of an aerated water factory which she wanted to erect. The defendant offered to sell and instal a Soda Water Plant on terms and conditions contained in a letter dated 4th December, 1951. She accepted this offer and paid Rs. 3,000/- on 11th December 1951 in advance. The receipt for Rs. 3,000/- is tendered and marked as Ex A. Although the plant was to be delivered and installed within a fortnight from the 11th December 1951, nothing was delivered by the defendant during the months of December, January and February. The defendant put off delivery on some excuse or other. On 23rd February 1952 the defendant begged for more time till a 6th March 1952 (i.e. for another fortnight) and the contract was modified with regard to delivery of some of the items of machinery. The plaintiff accepted this by her letter of 24th February 1952. But nothing was delivered by 6th March 1952 or during the rest of the month of March. In or about 1st April 1952 the defendant delivered only some of the parts and said that some other parts were in Lillooah and Dhurumtolla but the workshops there had failed to deliver these parts. From this time the defendant used to send two Mistries to 7, Kyd Street, every morning for about 8 or 9 days. These mistries came with a promise from the defendant every morning that the defendant would bring the balance of the plant that day, but the defendant never turned up with the balance parts and so the mistries used to wait for the whole day and then in the evening they would go back doing nothing. The plaintiff then wrote to the defendant to do something in the matter and the defendant came forward with the excuse that this head mistry was sick and the defendant was also very busy and so he could not turn up. At this the plaintiff said that if the defendant supplied all the missing parts of the plant she would get the machine worked with the help of her brother, but no parts were sent at the time and so nothing could be done. About the middle of April the defendant delivered some more parts but still some parts were wanting to make the plant complete. The plaintiff wrote on 22nd April 1952 giving a final chance to the defendant to supply the balance parts but as the letter was not replied to, nor was any step taken by the defendant to deliver the missing parts or to instal the plant, the contract was cancelled by the solicitor's letter of the 25th April 1952. It was suggested to the witness in

course of cross examination that she had inspected the plant before or at the time the contract was entered into but she has emphatically denied that, and stated, that she with her brother inspected in the beginning of April, some sort of a huge heavy iron stand—a funnel like thing and she found that one mistry was handpainting it. It is quite clear from her evidence that she did not understand anything about the machine at that time but she depended on her brother and the defendant for the supply of the proper machinery. Now, of course, she knows something about such a Plant as she has been running a plant for the last two years (Q. 104-110; Q. 168-169). The witness used to have a talk with the mistries sent by the defendant and in course of such conversation she came to know what parts were missing and so noted them down and subsequently referred to such parts in her letters (Q. 172). The witness has made it clear that is all the parts of the machine had been supplied her mistries would come and make the connection. It was because the work was not getting on that the witness suggested that she would get the work done by her own mistry (Q. 196-97). It was suggested to the witness that she was to supply a soaking tank and as that was not done, the work could not be completed by the defendant. This case that the plaintiff was to supply a soaking tank or that she failed to supply it is not made in the written statement. It is suggested for the first time in the defendant's letter of the 6th May 1952, after the contract was cancelled by the letter of 25th April 1952. The contract itself (letter of 14th December, 1951) shows that it was the defendant's obligation to supply the Soaking Tank. The plaintiff has denied that she was to supply any parts at all (Q. 214). It was also suggested to the witness that as she failed to get the electricity installed the defendant could not perform his part of the contract. The witness has stated that "this particular machine was to work with electricity or with hand and since the test was not carried out there was no sense in my getting the electricity installed" (Q. 207). It appears to me that the defendant has attempted to shift the blame on the plaintiff by suggesting that the plaintiff failed to do things which she was under an obligation to do. but it is clear that the suggestion is an after thought. The plaintiff has not been guilty of any omission which has prevented the defendant from fulfilling his part of the contract. The plaintiff gave her evidence in a very frank and straight forward

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manner and I have no hesitation in accepting her testimony as true.

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One Charu Chandra Ghose, the head mistry of the Calcutta Essence and Gas Supply Company, has also given evidence on behalf of the plaintiff. He went with his master Mr. Randelia to inspect the Machine, 7, Kyd Street, in May 1952 and after examining the parts along with his master he agreed with his Master's view that the parts supplied were not serviceable. It is clear that this witness has no clear recollection of what he saw about two years back. His evidence is that because the parts were not new, he was of opinion that they were not serviceable. It should be remembered however that the contract was for a Second Hand machine and so all parts could not possibly be new.

The evidence of this witness is not of assistance to the plaintiff.

Mr. Randelia, the proprietor of Calcutta Essences and Gas Supply Co. has also deposed on behalf of the plaintiff. He inspected the Machinery at 7, Kyd Street and submitted a report to the plaintiff. The report is marked as Ex. B. The witness was taken for the purpose of seeing whether the machinery could be repaired and put in working order. Upon inspection he found that it was a Junk, the parts were defective and if the plant was worked, the tank might burst. The witness has tried to make out that the Carbonator supplied by the defendant was not of the standard size, and the pump was of cheap quality metal. He did not test the machine but from its external appearance he gathered that it was not the Original Niagara Machine but many parts of its were manufactured in this country in local workshops and were not of durable or sound quality. It is true that the witness has intimate knowledge of the Niagara machine derived from his practical experience of over thirty years (Q. 106-112, 119-124) and he is a dealer of such machines, but it appears to me that it will not be safe to give full weight to the statements of this witness as there is a general or natural tendency on the part of one dealer or competitor in the same

line of business to decay or be little, the goods supplied by another competitor. But as I have got the impression that the defendant has not been quite straight forward in his dealing with the plaintiff it is not unreasonable to suppose that some parts of inferior quality were sought to be passed off by the defendant as the original parts of a Niagara Machine.

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Nanda Mondal, one of the two mistries of the defendant who used to wait at 7, Kyd Street from morning till evening for 10 or 12 days in the expectation that the defendant would come with the balance parts of the plant, has also given evidence on behalf of the plaintiff. He is no longer in the employ of the defendant and so the plaintiff has succeeded in procuring his attendance before the Court. He has frankly stated that he could not do anything at 7, Kyd Street because the defendant had not supplied all the parts of the machine. He has given a list of the missing parts (Q. 17 and 40). That these parts were not in fact supplied at all, is clear for the correspondence and also from the admission of the defendant in his written statement (para. 5) and in box. It is clear that this witness had refreshed his memory about the missing parts by discussion or otherwise, before he came into the box. It has not been suggested in cross-examination that this witness was never deputed to 7, Kyd Street or he was never there.

Mr. Humphreys, the defendant, has deposed before this Court. He has stated that he was the factory manager of Andrew Yule & Co.'s Carbonic Acid Gas Factory from 1914-1944. He has designed a machine known as "Sankey-back pressure filling machine" which is sold in the market. He is however not a graduate in Chemical Engineering, nor has any degree or diploma of any University. He admits the contract and its modification, but he states that the sum named as compensation payable, in letter of 23rd February 1952, is a penal sum inasmuch as the plant to be installed could not earn any profit for first six months and it could not at any time earn profit at the rate of Rs. 50/- per day (Q. 27-34). He has stated that for want of electricity the plant could not be installed. His evidence is that the Machinery was to be operated by electricity power and it could not be permanently fixed to the ground

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until electricity was supplied (Q. 47-49). He has also suggested that for want of a soaking tank to be supplied by the plaintiff, the washing machine could not be installed (Q. 50-51; 203-208). But as I have pointed out already, these are false excuses put forward to shift the blame on the plaintiff. It has been further suggested by this witness that there was no water supply which was necessary to complete the installation of the plant (Q. 52) but no such case is made in the written statement or in the correspondence though the case about electricity and soaking tank is thought of for the first time in the letter of the defendant of the 6th May 1952. Thus the case about the water supply, is also an after thought. The witness has suggested that some parts of the plant were delivered in the middle of March 1952, (Q. 63 and Q. 257). But it is clear from his answers to Q. 273-277 that the suggestion is obviously false. After being confronted with the letter of the 10th April 1952 written by the defendant himself and after being shown the list of machinery attached to it, he made the desperate effort of pointing to the bottom part of the Copper Mixer a miniature model of which was in Court, and stated that this part was supplied in the middle of March and not the whole Carbonator. But that this statement, is palpably false is clear from the letter of 10th April 1952, which shows that the bottom part of the Mixer was sent on the 10th April 1952. The defendant gave me the general impression that he was not a truthful witness and he had no scruples in inventing lies to justify his wrongful act or conduct. The witness stated in course of his deposition that the value of his workshop was Rs. 5,000/-. He was then confronted with his statement in the Affidavit in opposition affirmed on 2nd June 1952, and filed in the application for attachment before judgment made by the plaintiff, where he assesses the value at Rs. 5,00,00/- for workshop etc. The attempts that he made to reconcile the two statements show that he was inventing all sorts of lies.

As regards the provision for payment of compensation at the rate of Rs. 50/- per day, the witness states that the suggestion for insertion of such a provision in the letter of 23rd February, 1952 came from Mr. Agabeg (Q. 228-232). This may be true. Mr. Agabeg has not been called. Mr. Thaddaus, it may be noted, has also not been called. Now although the suggestion

about some provision for compensation might have been made by Mr. Agabeg, it is unlikely that the defendant would agree to the figure of Rs. 50/- per day unless there was some basis or date available to him, for agreeing to this figure. The witness has stated that the plant of the type contracted for can earn after 6 months, if worked to full capacity, even Rs. 200/- per day (Q. 278-287). It might be that it is on this basis, that the defendant thought that it would not be unreasonable to suppose that on or about 7th March 1952, that is after two months and a half after the date (26th December 1951) within which the plant should have been installed, the plant would earn profit at the rate of Rs. 50/- per day, although in the box he has suggested that a plant does not earn any profit for first six months. I do not think or believe, that it can be laid down as an inflexible rule that no plant can earn profit for the first six months. This false suggestion has been made to evade liability for compensation, altogether. The defendant is a fairly old and experienced gentleman and it is improbable that he would agree to any figure that would be suggested by Mr. Agabeg without any rhyme or reason.

The correspondence which record contemporaneous facts and throw a good deal of light on the actual state of affairs may now be referred to.

The letter of 4th December 1951 shows that soaking tank was to be supplied by the defendant and the whole plant was to be delivered and installed within a fortnight from date of acceptance of the offer. Now, although the delivery and installation was to take place within two weeks i.e. by the 26th December, 1951, nothing was done. The whole of December and January and three weeks of February passed by.

Then came the letter of 23rd February 1952 written by the defendant. From this letter it appears that the day before, the defendant had sent a hand operated plant for use pending supply of the plant ordered by the plaintiff. It is quite clear that the defendant was not in a position to supply the ordered plant up till that date. But he was keen on inducing the plaintiff to purchase a six Head Back pressure bottle filling machine—an item which was not in the original contract. The original

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contract was modified in respect of few items of machineries. The time for delivery was extended till 6th March, 1952. The clause for compensation was inserted.

The plaintiff replied on the 24th February 1952, she did not accept the offer of six Head Back pressure machine but she accepted other terms, and made it clear that no further time beyond 6th March 1952 would be allowed for performance of the contract. Apparently nothing was done by the defendant towards implementing his obligations under the contract for about five weeks after the 23rd February 1952.

The defendant's letter dated the 1st April 1952 February, 1952, shows that the plaintiff and others had discussion with him on that day. The plaintiff insisted that the whole plant must have to be delivered by the following day. The defendant assured that he would do so. The connections of the plant had not till then been fabricated and the plaintiff offered to get an expert Mistri for fabrication of the connections and adjustment of the machinery, which would be done under supervision and under instructions of the defendant. It is suggested by the defendant in this letter that some parts had already been delivered in the middle of March, 1952.

On 5th April 1952 the defendant wrote another letter in which he tried to shift the blame of not completing the installation on the plaintiff's mistry and it is also suggested that the complete part was delivered on 2nd April 1952.

On 6th April 1952 the plaintiff replied to the defendant's letter of the 5th April, and pointed out that the complete had not been delivered and she mentioned the specific items which had not been delivered till then. It was further pointed out that no blame could be shifted on to the plaintiff's mistry.

On the 10th April 1952 the defendant wrote to the plaintiff's brother and along with the letter sent some parts of the plant. The letter also sets out a list of the parts delivered on the 2nd April 1952. This letter shows that certain parts were still outstanding and had not been set till then.

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Then follows the letter of the defendant dated the 21st April 1952. It shows that Mr. Agabeg had used harsh and abusive words to him. It is clear that the situation had been made intolerable by the defendant's conduct in not fulfilling the contract after pocketing Rs. 3,000/- about 4 months back and so Mr. Agabeg could not control his temper any longer.

On the 22nd April 1952 the plaintiff replied to this letter of the defendant and pointed out that the unpleasantness had been brought on by the defendant himself. The plaintiff also pointed out that five items of articles which were necessary to make the plant complete had not till then been delivered by the defendant. The fifth item was obviously inserted under a misapprehension as it appears that the defendant was not under any obligation to supply this item. It also appears from this letter that some testing was done by the defendant's Mistries but the two Head Machines were found to be not in working order.

As even after the letter of the 22nd April 1952, the balance parts of the plant were not supplied and no reply was given to this letter, it became patent to the plaintiff that the defendant was not at all serious about the matter and so she approached a solicitor and caused the letter of 25th April 1952 to be written to the defendant, cancelling the contract, asking for refund of the advance of Rs. 3,000/- with interest and for payment of compensation at the rate of Rs. 50/- per day. The letter also asked the defendant to take away or remove the materials from the plaintiff's premises.

But no reply was sent to the solicitor by the defendant.

On 5th May 1952, the plaintiff's solicitor sent a reminder to the defendant.

On 6th May, 1952 the defendant wrote a letter to the plaintiff direct, in which he referred to the two letters of the plaintiff's solicitor, and suggested for the first time, that it was because of the plaintiff's failure to have the electricity installed and to have a soaking tank purchased, that the defendant was prevented from fulfilling his part of the contract. It is clear

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that as the matter had now passed into the hands of the Solicitor, the defendant was trying to invent excuses for non-performance by him of his part of the contract.

It is thus clear from the correspondence and the oral evidence on record, that when the first Agreement or contract was entered into in December, 1951, the parties thought and agreed that two week's time was reasonable and sufficient time for performing the contract including installation of the whole plant. The defendant undertook to complete the installation within that time.

It is however clear that for some reason or other, not a single part of the machinery ordered by the plaintiff, was delivered till 23rd February, 1952.

Then the contract was modified on the 23rd February, 1952 and fresh time for performance was stipulated. A further two week's time was agreed upon. So this period was according to the parties a reasonable time for performance. Thus the two letters of 4th December, 1951 and 23rd February, 1952, show that a fortnight's time was considered as reasonable and sufficient time for performance of the contract.

But not a single part of the plant was delivered by 6th March 1952, which was the last date of the extended period. In fact three more weeks passed from 6th March, 1952, and yet there was no sign of any part of the Machinery. The evidence of the defendant that he supplied the bottom part of the Carbonator in the middle of March, 1952 is, as I have shown already, obviously false in view of his letter of 10th April, 1952 where he sets out the list of parts that he supplied on that day. Then on the 2nd April, 1952, the defendant supplied only parts of the plant although the plaintiff insisted on the whole plant being delivered by that day. On 10th April, he sent few more parts. Then for another ten days no further steps were taken by the defendant. Mr. Agabeg called on the defendant on 21st April 1952 and used harsh words. The defendant took exception to this by his letter dated 21st April 1952. The plaintiff at once replied to this letter by her letter of the 22nd April 1952 and pointed out that certain specific article had not

till then been supplied and she also called upon the defendant to come and put the plant in order and supply the balance parts of the Machine. No reply was received to this letter and no further steps were taken by the defendant. Naturally the plaintiff whose patience had been exhausted by this time, approached the Solicitor and had the contract cancelled. Thus there can be no doubt that the defendant has committed breach of the contract and the plaintiff was justified in cancelling the Contract.

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It was suggested by the Counsel for the defendant that the plaintiff had at no time rejected the plant but had accepted it and so cannot complain of any breach of contract. There is no force in this suggestion. The defendant started sending parts of the machine in dribblets since the beginning of April 1952. There could be no question of rejection until the plaintiff had seen the whole plant or machinery. But at no point of time, all the parts had been delivered. It is when the plaintiff despaired of getting the machine supplied and installed by the defendant that she cancelled the contract and asked the defendant to take back the goods.

Mr. Ghose drew my attention to the case of *Mackay v. Dick* (1); but this case has no application to the facts of the case before me and so need not be dealt with. The plaintiff in my view has not been guilty of any laches nor has she failed in any way to perform her part of the contract, and so the principle enunciated in the decision of the House of Lords is of no assistance to the defendant.

The next question is what reliefs the plaintiff is entitled to.

An incomplete Soda Water plant with some parts missing was absolutely useless to the plaintiff. The contract was for the supply of a complete plant and for installation of the same and for putting the same in a working order. Admittedly certain parts, though they might be minor parts, and though the value thereof would not perhaps exceed Rs. 500/- had not been supplied. The plaintiff was under no obligation to accept this

(1) (1881) 6 Appeal cases 251.

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incomplete plant. Moreover it was not known unless the whole plant was put in running order whether the parts actually supplied were at all fit for the purpose for which they were supplied. In the circumstances the consideration of the contract may be said to have wholly failed, and the plaintiff is entitled to refund of the advance of Rs. 3,000/- with interest thereon pending suit at the rate of 6% per annum.

The claim for damages of Rs. 2,000/- has not been pressed by the plaintiff and so this head of the claim need not be considered at all.

As to the claim for godown rent at the rate of Rs. 130/- per month from January to May, 1952, it appears that this claim cannot be allowed in full. It is clear from the evidence of the plaintiff that she was paying the rent for the entire godown at the rate of Rs. 130/- per month. It is also clear from evidence that even if the complete plant had been supplied and installed by the defendant, the same would not have occupied the entire space of the godown. Some parts of the godown would have been used as an office and for storing durwan's belonging as is being done now at the premises, where the plaintiff is now running a Soda Water plant purchased by her from some other dealer. Moreover the plaintiff had agreed to accept performance of the contract by the 6th March, 1952. The plaintiff has pleaded and proved that the contract December, 1951 was modified and substituted by another Agreement on 23rd February, 1952 under which, some new parts of the machines in place of the old parts would have to be supplied by the defendant and the time for performance was extended up to 6th March 1952. Having agreed definitely to accept performance within 6th March, 1952, the plaintiff cannot properly make the defendant liable to pay the rent of the godown up to 6th March, 1952. But after that she did not get any delivery till 1st April, 1952. On that date (1st April, 1952), she insisted on delivery being given the next day and some parts were accordingly delivered on the 2nd April, 1952. Some more parts were delivered on 10th April, 1952. Then again no further delivery was made till 22nd April, 1952. The plaintiff then called upon the defendant by letter to deliver the balance of the parts. But as no steps were taken by the defendant to comply with the plaintiff's de-

mand, the plaintiff cancelled the contract on 25th April 1952 and put it out of the power of the defendant to perform the contract any more. It has been suggested that time was extended till 24th April but there is no evidence of mutual consent. Plaintiff's admission on the point means that she expected delivery by the 24th April at the latest, and so gave the defendant a final chance by her letter of 22nd April, 1952. In the circumstances, it appears to me that it will not be unreasonable to allow the plaintiff compensation under this head for the period 7th March 1952, to 25th April, 1952 at the rate of Rs. 100/- per month (deducting Rs. 30/- per month out of Rs. 130/- for the portion which would have been occupied by the office and the durwan's belongings). I therefore allow Rs. 160/- as damages under this head.

The next question is whether the plaintiff is entitled to claim compensation at the rate of Rs. 50/- per day as stipulated in the letter of the defendant dated the 23rd February, 1952.

The relevant clause is as follows:—

"The plant detailed in my letter dated 4th December 1951, is to be delivered at 7, Kyd Street, Calcutta, on or before the 6th day of March, 1952. In the event of my failure to do so for any reason except Riots, Civil Commotion, or my personal incapacitation due to serious illness or injury, I shall pay you as compensation for such delay the sum of Rs. 50/- per day or part of a day, delivery is effected after the 6th day of March, 1952."

Mr. S. Ghose, the learned counsel for the defendant has submitted that this provision is of a penal nature or in other words the stipulation is a penalty and therefore all that the Plaintiff can claim is reasonable compensation for the breach of contract (if there has been such breach) and not the sum mentioned in the clause in question. Mr. Ghose has further submitted that the onus is on the Plaintiff to prove such reasonable compensation and in the absence of any proof the plaintiff is not entitled to any damage under this head.

Now the plaintiff has not given any evidence of damage

under this head. Although she is admittedly running a Soda Water plant now, no evidence has been adduced to show what profit she is making per day and since then. No books of account have been produced, by the plaintiff. No other person who is in this line of business, has been called to show what profits a person normally makes by running such a Plant. In the case of *Bhai Panna Singh v. Firm Bhai Abjan Singh* (1) Lord Atkin in delivering the judgment of the Judicial Committee observed as follows:—

"The effect of the Indian Contract Act of 1872, Section 74, is to disentitle the plaintiffs to recover simpliciter, the sum of Rs. 10,000/- whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered."

Mr. S. Ghose, relies on this passage and contends that even if a sum is named in a contract as the sum payable in case of breach, or the contract contains any other stipulation by way of penalty, the party complaining of the breach cannot get any damage unless he proves actual loss or damage.

Mr. Justice Ameer Ali in the case of *Mahadeo Prasad v. Siemens India Ltd.* (2), has construed this passage in the Privy Council Judgment (page 1382-1383) and has also interpreted section 74 of the Contract Act. The learned Judge came to the conclusion having regard to the word, "Whether or not actual damage or loss is proved to have been caused thereby," that, if there is no evidence showing that the figure named is unreasonable or excessive, the contract made by the parties estimating their damages is in itself evidence and if there is no other evidence of damage, then in certain cases, this evidence alone will be considered sufficient. The learned Judge however made it clear that the sum named is not conclusive under all circumstances and in all cases. Ameer Ali, J. thought that it was some proof. (See also *Brahmaputra Tea Co., Ltd. v. Scarth* (3). This judgment of Ameer Ali, J. has not been approved of by the Lahore High Court. See *Mool Chand Behari Lal v. S. D.*

(1) (1929) 33 C.W.N. 949 (P.C.).

(2) (1933) I.L.R. 60 Calc. 1379.

(3) (1885) I.L.R. 11 Calc. 545 at 550-51.

Chand & Co. (1). But it appears to me that the Lahore High Court has completely overlooked the words "whether or not actual damage or loss is proved" as used in Section 74 of the Contract Act. In my view the judgment of Ameer Ali, J. gives due stress on all the words of Section 74 and brings out its correct meaning, and I respectfully follow that decision. What section 74 of the Contract Act means is that a party cannot get the full amount mentioned in the Contract as a matter of absolute right or as a matter of course. But if the party proves that he has suffered damage to the extent of the full amount or that the Court considers, even without any proof, that the full amount is a reasonable compensation which can be awarded under the circumstances, the Court can award the full amount. One thing is however certain, that the party is entitled to get some amount, not exceeding the sum named, which the Court considers as reasonable compensation, whether any actual loss or damage is proved to have been suffered by him or not.

It is true that in the case before me the defendant has given evidence to the effect that the clause for payment of Rs. 50/- per day is a penal clause and it was not genuine pre-estimate of damages. He has also stated that a plant does not earn any profit for the first six months and after that period a plant like the one contracted for could earn profit from Rs. 5/- per day to Rs. 200/- per day at the highest. I have already indicated that I am unable to accept this testimony of the defendant as wholly true. The general impression made by the defendant on me has been that he cannot be relied on as a truthful witness. Moreover he had agreed to this figure of Rs. 50/- per day in his letter of the 23rd February 1952. It is not suggested that he was forced to agree to this figure at the suggestion of the plaintiff or her business partners, though no doubt it is suggested that Mr. Agabeg suggested that some compensation should be paid. The defendant is a man of great experience in this line of business. He has been dealing in Soda Water plants for a long time. He was for a long time the factory manager under Andrew Yule & Co., in a factory which he describes as the largest in Asia. I have therefore no doubt that the defendant had agreed to and put in the figure of Rs. 50/- per day as he thought that this was a reasonable amount and a genuine pre-

(1) (1947) A.I.R. Lah. 112 at 115 (paras 18-19).

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estimate of damages. I have dealt with this aspect in some detail in an earlier part of this judgment.

The learned Counsel for the plaintiff has invited me to hold that the provisions for payment of Rs. 50/- per day is not a stipulation by way of penalty. It appears to me that in view of the decision of *Law v. Local Board of Redditch* (1), it should be held that the sum of Rs. 50/- per day as mentioned in the letter of 23rd February 1952 is liquidated damages and not penalty. The sum was payable on a single event only viz., non-completion of the delivery of the plant by 6th March 1952, and so according to the canon of construction laid down by Lord Esher M. R., L. J. Lopes and L. J. Kay, the compensation payable was liquidated damages. (See also the case of *Cellulose Acetate Silk Co., Ltd. v. Widnes Foundry Ltd.* (2).

This question, however, whether the provision for payment of compensation at Rs. 50/- per day is a stipulation by way of penalty or liquidated damages is not of importance in view of the provision of Section 74 of the Indian Contract Act.

As there is no reliable evidence that the sum named is an unreasonable or excessive one, the plaintiff, would, in view of the interpretation of Section 74 as given by the Calcutta High Court be entitled to get compensation at the rate of Rs. 50/- per day. But the defendant has stated that the sum is an unreasonable one and this evidence stands uncontradicted and as it may be true to a certain extent, I think that if compensation is allowed under this head at Rs. 25/- per day, it will not be an unreasonable compensation. So in order that there may not be any injustice done to the defendant, I propose to award compensation at the rate of Rs. 25/- per day.

Now the further question that presents itself is, for what period is the plaintiff entitled to get this Rs. 25/- per day? Now, it is clear that on the 25th April, 1952, the plaintiff cancelled the contract and put it out of the power of the defendant to fulfil his obligations under the contract. So the plaintiff is

(1) (1892) 1 Q.B. 127.

(2) (1933) Appeal Cases 20.

entitled to Rs. 25/- per day up to the 25th April 1952. Therefore for the period 7th March 1952 to 25th April 1952 the plaintiff is entitled to Rs. 1,250/- on this head of claim (See *De Soysa v. De Pless* (1)).

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It was argued by Mr. S. Ghose, on behalf of the defendant that by the granting of extension of the time for delivery this provision for compensation has been waived and so the plaintiff cannot ask for its enforcement. I do not think there is any force in this contention. The effect of this clause for compensation was that in case the defendant failed to complete the delivery of the plant by the 6th March, 1952, the plaintiff would accept the performance of the contract after the stipulated time subject to the payment of damages which are fixed. Mere extension of time is only a waiver to the extent of substituting the extended time for the original time but this did not amount to a waiver of the provision for compensation. To deprive the plaintiff of this right of compensation it must be shown that there has been express waiver of this particular provision by the plaintiff. There is no evidence of such waiver.

There will therefore be a decree in favour of the plaintiff for Rs. 4,410/- with interim interest (i.e. pending suit) on the sum of Rs. 3,000/- at 6% per annum. The defendant will pay to the plaintiff the costs of the suit on Scale No. 2 including reserved costs, if any. There will be interest on decree at 6%. The Plaintiff will be entitled to be paid the sum of Rs. 3,000/- lying in deposit with the defendant's Solicitor and she is entitled to appropriate the same in part to satisfaction of her claim. The defendant will be at liberty to remove at his own cost the goods supplied by him and lying at 7, Kyd Street, Calcutta.

S. N. Ghosh: Solicitor for the Plaintiff.

B. P. Roy: Solicitor for the Defendant.

S.G.P.

Suit decreed.

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APPELLATE CIVIL.

*Before Mr. Justice S. R. Das Gupta and
Mr. Justice P. C. Mallick.*

AKHILESWAR SAHA PRAMANICK

THE STATE OF WEST BENGAL.*

Section 218, Indian Succession Act—Right of the creditor to apply for Letters of Administration—Whether such right is barred for not taking recourse to a suit by the provisions of Bengal Regulations XIX of 1810 and the general rules of the Bengal Practices and Procedure Manual, 1934.

A creditor has the right under the Section 218 of the Indian Succession Act to apply for Letters of Administration. The fact that he had not taken recourse to a regular suit is as ground for refusing Letters of Administration to him if he is otherwise entitled to the same.

Article 7 of the Bengal Regulations XIX of 1810 lays down that the general superintendence of Nazul properties of escheat is to be vested in the Board of Revenue, which will do certain things mentioned therein. Article 361 of the Bengal Practices and Procedure Manual lays down that as the Board is vested with the general superintendence of all escheat properties the Collector should take immediate possession of such property on the part of the Government and take measures at the same time to invite claimants to the property as publicity as possible. They are regulations made for the purpose of maintaining the custody and for disposal of properties which would escheat to the Government; in other words, they are mere departmental directions for the proper administration of such properties. They do not, in any way, govern the right of third parties vis-a-vis the Government. The right of a creditor to obtain Letters of Administration in case there is no heir and there is no application by any body for such Letters of Administration as provided for in Section 218 Indian Succession Act is by no means taken away by these regulations.

The material facts will appear from the judgment.

Dwijendra Krishna Dutt and Kumar Krishna Dutt for the Appellant.

Hemendra Kumar Das and Tapendra Kumar Pal for the Respondent.

* Appeal from the Original Decree No. 244 of 1952 against the decree of Shri G. P. Mukherjee, District Judge of Zillah Nadia at Krishnagar in Original Suit No. 25 of 1951, dated the 14th of June, 1952.

The judgment of the court was as follows:—

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S. R. Das Gupta, J.—This is an appeal against an order of Shri G. P. Mukherjee District Judge of Nadia dismissing an application of the appellant for Letters of Administration to the estate of one Manua Khepa Baba deceased.

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The appellant claims to be a creditor of the deceased Manua Khepa Baba. His claim is for the sum of Rs. 4,325/-, due on a hat chita. It appears that the said Manua Khepa Baba died at Benares on the 21st October, 1949. He had no heir and he left no will. So under the law of the land his estate would escheat to the Government. The deceased left properties in the districts of Nadia and Burdwan. After his death as nobody applied for Letters of Administration, the appellant on the 16th June, 1950 made the present application for grant of letters of administration to the estate of the deceased. The application was made on the footing that the applicant was creditor of the said Manua Khepa Baba. An objection to the said application was filed by the State of West Bengal. In the written statement which was filed by the Government it was *inter alia* stated that the allegations in the petition that the appellant is a creditor and the deceased Manua Khepa Baba executed a hat chita for the sum of Rs. 4,325/- on the 16th of Baisakh, 1336 B.S. are not admitted and even if the appellant had got any claim against the estate of the deceased, he could very well file and prove the same before the Collector or in a Civil Court. The matter came up for hearing before the District Judge of Nadia. Several issues were raised. All those issues related to the question as to whether or not in view of the escheat proceedings which had already been started by the Collector in respect of the estate of the deceased, the present application was maintainable. That in substance is the implications of the issues which were raised before the learned District Judge. The District Judge also dealt with all the issues together and came to the conclusion that the appellant was not entitled to maintain the present application. The ground on which the learned District Judge based his aforesaid conclusion was that escheats proceeding was started by the Collector on the 31st January, 1950 and if the plaintiff had got any debt or claim against the estate of the deceased Manua Khepa Baba it was his

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business and duty to file and prove the same before the Collector in that escheats proceeding, because that proceeding was started long before the present application for the grant of Letters of Administration was filed. He further held that the appellant had also got opportunities to bring a suit in Civil Court and to prove his claim and if he did not avail himself of the said opportunities that was his fault and negligence and because of such fault and negligence he could not claim as a matter of right to be entitled to the grant of Letters of Administration. With all respect to the learned Judge we are entirely unable to see the force of his reasoning. We do not understand why a creditor must prove his claim against the estate before the Collector although an escheats proceeding may have been started by the Collector. The Bengal Regulations XIX of 1810 and the general rules of the Bengal Practices and Procedure Manual, 1934, were placed before us in support of the view taken by the learned District Judge. But we are unable to see anything in those rules and regulations which can in any way support the said decision. The Bengal Regulation XIX of 1810 is a Regulation *inter alia* for the custody and disposal of Nazul properties of escheats. Article 7 of the said Regulation to which reference was made on behalf of the Government simply lays down that the general superintendence of Nazul properties of escheats is to be vested in the Board of Revenue, which will do certain things mentioned therein. Article 361 of the Bengal Practices and Procedure manual, to which also our attention was drawn on behalf of the Government *inter alia* lays down that as the Board is vested with the general superintendence of all escheats properties the Collector should take immediate possession of such property on the part of the Government and take measures at the same time to invite claimants to the property as publicly as possible. The articles in our opinion can lend no support to the view taken by the District Judge. They are regulations made for the purpose of maintaining the custody and for disposal of properties which would escheat to the Government; in other words, they are mere departmental directions for the proper administration of such properties. They do not in any way govern the rights of third parties *visa vis* the Government. In our opinion the right of a creditor to Letters of Administration in case there is no heir and there is no application by any body for such Letters of Administration, granted by the Indian

Succession Act (Section 218) is by no means taken away by those regulations. If then the appellant has the right to obtain Letters of Administration, there having been no application either by the Government or by any body else for such administration, we fail to see how on the grounds that escheats proceedings have been started by the Collector the said right could be defeated. In our opinion the judgment of the learned District Judge on this point cannot be supported.

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We are also unable to accept the view taken by the learned Judge that as the appellant had opportunities to bring a suit in a Civil Court and prove his claim he is guilty of negligence for not having availed himself of such opportunities and because of such fault and negligence he cannot claim as a matter of right to be entitled to the grant of Letters of Administration. The appellant undoubtedly could have gone to the Civil Court and got a decree in respect of his claim. He has also the right under section 218 of the Indian Succession Act to apply for Letters of Administration. The fact that he had not taken recourse to a regular suit is in our opinion no ground for refusing letters of Administration to him if he is otherwise entitled to the same. This ground of the learned District Judge must also be overruled.

The learned senior Government Advocate who appeared on behalf of the State then contended before us that the appellant has not proved his claim before the learned District Judge. He also drew our attention to a statement in the judgment of the District Judge, where he says that the appellant has not proved also that he is a creditor of the deceased Manua Khepa Baba. The question as to whether or not the appellant was in fact a creditor of the said deceased was not made an issue at the hearing before the District Judge and therefore the appellant had no reason to call any witness to prove that fact. It was not contested before the learned District Judge by the State of West Bengal that he was a creditor of the deceased. All the issues as I have indicated related to the question as to whether or not in view of the escheats proceeding the application was maintainable.

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In the circumstances we fail to see how it can be contended, not having raised any issue regarding the same, that the appellant has failed to prove that he is a creditor, the learned Senior Government Advocate then contended before us that his client had taken this ground in its written statement and therefore an opportunity should now be given to its client to agitate the same. In view of the fact that the Government in its written statement did not admit that the appellant was a creditor, we are inclined to accede to this request of the learned Senior Government Advocate, but we shall do so on terms. We will award costs to the appellant not only of this appeal but also of all proceedings held in the lower court.

The order we make, is that the matter will be sent back to the trial court for determination of the question as to whether or not the appellant is a creditor of the deceased Manua Khapa Baba. The State of West Bengal will pay to the appellant costs of this appeal and the costs of all proceedings held before the lower court.

The hearing fee of this appeal is assessed at three gold mohurs.

Mallick, J.:—I agree.

Appeal allowed

P.K.

Case remanded to the lower Court.

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookherjee and Mr. Justice
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The deposition of a witness how to be approached—Contract between the parties, ascertainment of—Usual and unusual arrangement, value of oral and documentary evidence in giving effect to one or the other—Relief not specifically made in the plaint but not inconsistent with the case, court's power to grant such relief—Remuneration of a person working under another not for love, how to be determined—Where there is specific contract applicability of quantum meruit—Plaintiff entitled to profits—Courts duty to ascertain:

The approach of the deposition of a witness with reference to the probabilities and surrounding circumstances is not altogether unwarranted but such approach should not be made with an air of suspicion. But when the statement of a witness becomes improbable or wholly inconsistent with the surrounding circumstances it can be rejected.

The arrangement between the parties has to be tested with reference to their conduct as may be ascertained when the contracts were being duly performed. Strange and peculiar arrangements may be made between them under circumstances which are not normal or usual. The Court shall reject such unusual arrangement when it is mainly dependant on oral evidence and when that too is wholly improbable but the Court must give effect to same when it is based wholly or in substantial part by undisputed documentary evidence.

It is not well settled that a Court is entitled to grant a specific relief not inconsistent with the case as made but not specifically made in the plaint.

It is well known that if there be no contract between the parties and one is made to work under another not for love but for remuneration, the principles by which the Court would be governed, would be analogous to those which regulate the assessment of remuneration for services as between a principal and an agent. The right of an agent to be remunerated for service is founded upon an express or implied contract between the prin-

* Appeal from Original Decree against the decree of Sri G. C. Roy, Subordinate Judge of Zillah Darjeeling in Money Suit No. 7 of 1948, dated 3rd August, 1948.

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cial and the agent. In the absence of a contract, if there be a custom or usage reference may be made to the same. In other cases the conduct of the parties and the circumstances of the particular case would determine how such remuneration is to be determined. It is now well settled also that if there be a specific contract assessment on the basis of *quantum meruit* will not be attracted; but if the express contract for remuneration were a nullity by reason of its having been made, as for example, without authority, the agent will not thereby be prevented from recovering upon *quantum meruit*.

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If there is an express contract that remuneration will be paid, or that the plaintiff is entitled to the profits, it is not only open to the Court but also it is its bounden duty to find out the equitable manner in which such profits are to be ascertained.

A claims to have been appointed as a sub-contractor under B for certain special works upon terms that the profits would go to A but B admits to have engaged A on a certain pay and bonus dependant upon the extent of the profits and devides A to be a sub-contractor under him—Held that A is entitled to the profits of the said contract and B is not taken by surprise but he had notice and had adduced evidence in support of his contention and in opposition to the claim as made by A.

Hyon v Mill (1); *Hemendra Nath Roy v. Upendra Narayan Roy* (2); *Cravan Ellis v. Canuon Ltd.* (3) and *Kissen Prosad v. Purnendu Narain* (4) referred:

The material facts will appear from the judgment.

Rajendra Bhusan Bakshi and Satya Priya Ghose for the Appellant.

Dr. Nares Chandra Sen Gupta and Joy Gopal Ghose for the Respondent.

The judgment of the Court was as follows:—

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R. P. Mookerjee, J.:—This is a plaintiff's appeal and arises out of a suit brought by the plaintiff for realisation of Rs. 10,000/- and add from the Defendant being the amount of profits earned in the execution of certain repairing jobs and for

(1) 13 Ves. 114 (119).

(2) (1915) 22 C.L.J. 419 (451).

(3) (1936) 2 K.B. 403.

(4) (1911) 16 C.W.N. 753 (761).

any other relief or reliefs to which the plaintiff may be found entitled to. The Plaintiff claimed that an agreement had been entered into between him and the defendant whereby the latter placed him in charge of certain repairing works at Kurseon under certain terms. It was claimed that under the arrangement the plaintiff was entitled to get the entire profits which the defendant would earn Rs. 57,000/- and odd was alleged to have been received by the defendant for the said contracts and Rs. 46,000/- and odd have been spent by him. Accordingly the plaintiff was entitled to get Rs. 10,000/- and odd from the defendant. The plaintiff also claim another small amount for another item of work done by him, but this latter claim was not pressed.

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The defence was to this effect. There had never been any contract or agreement between the parties. The plaintiff being a distant relation of the defendant had approached the latter for some service under him. He was engaged as an additional *baider* for the contract works; he being paid a certain salary and an additional bonus if the defendant was satisfied with his work. Certain amounts had been paid by the defendant to the plaintiff and nothing was due to the latter. It was further alleged that the suit had been filed as a counterblast to the defendant threatening the plaintiff to take certain steps against him as also to make an illegal gain. Evidence was adduced by both sides.

The learned Subordinate Judge disbelieved both the plaintiff as also the defendant so far as some of the allegations was concerned. He came to the conclusion that the alleged agreement, dated the 10th February, 1946, had not been proved. At the same time, the story set up by the defendant that the plaintiff had been engaged on the terms as already stated was not true. He held on the materials before him that the plaintiff had been engaged by the defendant to supervise the two contract works—on a certain profit sharing basis. What exactly the share was could not be fixed by the Court. He having held that the entire profits were not to go to the plaintiff, and the plaintiff having come to court on a definite case of a certain amount being due on a contract, the plaintiff's suit was liable to be dismissed. The plaintiffs claim was accordingly dismissed. The plaintiff has appeal to this court from the said judgment and decree passed by the learned Subordinate Judge of Darjeeling.

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We may at the very outset indicate that both the plaintiff and the defendant had not come to Court with the full and true story. They had not divulged the whole story about the terms used which the plaintiff had been engaged, as he admittedly was, by the defendant in respect of the two contract works.

We would now consider as to the effect of the evidence as has been adduced so far as the principal allegations and counter allegations made are concerned. The plaintiff's case was that at the time when the proposal for certain matrimonial alliance between the defendant's daughter and the plaintiff's sister's son was in progress in January, 1946, both the parties had come to Calcutta. The two were stopping at two different places. In Calcutta in the presence of certain other persons there was an arrangement made between the plaintiff and the defendant that the latter would allow the plaintiff to get a Sub-contract of one repair contract which the defendant had already secured and another which he expected to secure in the near future. The defence was a total denial of the talks alleged to have taken place in Calcutta. The principal witnesses in support of the allegation made as to the incidents taking place in Calcutta were Mangal Narayan Pradhan, plaintiff's witness No. 8, and the plaintiff himself. Mangal Narayan is admittedly man of position, and though he has some connection with the plaintiff, we do not think that his evidence can be rejected as unreliable. The learned Subordinate Judge while dealing with the oral evidence adduced in the case has tested the statements made with reference to the probabilities and surrounding circumstances of the case. No doubt, such an approach is not altogether unwarranted, but one is not to approach the deposition of a witness with an air of suspicion, but only so far as the statement made by a witness becomes improbable or wholly inconsistent with the surrounding circumstances that the statement made by a witness can be rejected. The evidence which has been adduced about the talks in Calcutta is not only a probable one in the circumstances of this case, but also a natural one.

On the admitted case as made by the defendant that the plaintiff had been placed in charge of work leaving out of our

consideration, for the present, as to the particular capacity and responsibilities in which he had been so working, we cannot ignore the very important fact that the work began as from the 12th February at Kurseon. This is not denied by the defendant. We shall consider the evidence as to the alleged talks on the 8th February at Kurseong or on the 10th February at Darjeeling. The fact remains that on the 12th the plaintiff had started to supervise the work under some arrangement already made, even according to the story set up by the defendant. The defendant has not been able to satisfy the Court as to what was the occasion or what were the circumstances under which the plaintiff and the defendant made and entered into some arrangement or other for the supervision of the work on the 12th February. Direct evidence might easily have been produced by the defendant had such—arrangement been made on an occasion or occasions other than those as alleged by the plaintiff. The defendant, however, failed to adduce proper and sufficient evidence as to that. Looking at the broad fact, therefore, it seems only possible and probable that there had been talks between the parties before the work was taken up on the 12th February. Whether the talk had actually taken place in January in Calcutta or not is not so very important, but that seems to be the starting point, according to the plaintiff. The suggestion of the plaintiff is that he was to be engaged in some capacity so as to make it possible for him to earn something. An attempt was made by the defendant to show that the matrimonial talks had taken place directly between the Plaintiff's sister's family, which consisted almost wholly of female—members, and the defendant and not through the plaintiff. The plaintiff's case was on the other hand that he had some part to play during the negotiations. This part of the case cannot be disposed of in the summary fashion as has been done by the learned Subordinate Judge. While proposal for such matrimonial alliances were being considered it was not unnatural but more probable that talks about other financial relationship between parties were also broached. But here also too much importance need not be placed on the motive which actuated the parties to arrange that the plaintiff would supervise the defendant's contract work. The fact remains that he was engaged and was engaged for pecuniary profit. The whole question is what was the nature of the pecuniary consideration

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and what were the terms which were entered into. We accept the plaintiffs case that he took part in the talks of the matrimonial alliance between the two families.

With regard to the talk at Kurseong and the visit to the place of the first contract on the 8th February the evidence principally is here also of the plaintiff himself and of Mangal Narayan Pradhan, relating to the period between the 8th and 18th when the work was actually started. The plaintiff is alleged to have come to Darjeeling on the 10th February. The witnesses examined in support of that story are Dil Bahadur Subba, witness No. 2 for the Plaintiff, and Leo Engshaw, a Chinaman, witness No. 3 for the Plaintiff. This part of the evidence where the plaintiff alleges the handing over of exhibit I (the alleged letter in incorporating the terms of the agreement for a Sub-contract between the Plaintiff and the defendant) is not very convincing. There are certain items of suspicion which the Plaintiff has not been able to get over. If after the talks at Calcutta there was no direct contract between the Plaintiff and the defendant until they met on the 10th February as alleged by the Plaintiff, it would not be very natural for the defendant to have kept ready a detailed contract and hand it over to the plaintiff as soon as he came to his shop. A part from this improbability defendant has attempted to show that during the continuance of the work the defendant had sent to the plaintiff blank sheets of paper with his signature. This is not denied by the Plaintiff, and on the other hand, this finds support from some of the papers under the Plaintiff's own signature. Whether this particular piece of paper on which exhibit 1 is written is one of those blank papers which had been utilised by the plaintiff or not one cannot be sure about. We may leave this part of the case for the present with this observation that agreement alleged to have been entered into by exhibit 1, had it stood by itself, it would have been very difficult for us to accept the position taken up by the Plaintiff. At the same time, with regard to the dispute between the parties, if it were to be decided on exhibit 1 alone, we would not have been justified in allowing the claim put forward by the Plaintiff. We shall have also to consider that even if the story as put forward by the Plaintiff is not accepted in its entirety whether the

Court is otherwise entitled to or can give any relief in any shape or form to the Plaintiff.

As we have indicated already it being the admitted case of the defendant that the defendant had engaged the Plaintiff, it is for us to find out the terms and conditions under which the Plaintiff had been so engaged and further whether such terms and conditions were as alleged by the Plaintiff or as Contended for by the defendant.

We have already pointed out that there had been talks between the parties before the Plaintiff was put in charge of the defendant's contract work on the 12th February. It might have been easy to determine the issues in the case and the conditions under which the Plaintiff was working if exhibit 1 had been undisputed or could have been accepted by us on the face of it. We have to proceed now to consider the evidence, keeping out of our view for the present exhibit 1 in the case. What are the direct pieces of evidence and the probabilities and circumstances of the case? It is the common case of the parties that the original contract work which was stated on the 12th February, continued by the subsequent acceptance of another contract and supplementary tenders which were accepted from time to time for repair works for over nine to ten months, if not more. During this entire period the plaintiff was carrying an supervision work. According to the plaintiff, the arrangement was that the defendant would supply the necessary finance for the carrying out and fulfilment of the contract. One of the *laidars* used to take the attendance register to the defendant and bring money from Darjeeling and Kurseong. This is the common case. Further payments were made to plaintiff by the defendant also the purpose of the contract. The amounts so paid are also not indispute. The defendant further paid directly the bill of different parties who supplied the materials for the due execution of the contract. The defendant had produced before the Court witnesses from those different firms, and the plaintiff also had not contradicted the part played by the defendant in the matter of financing the contract works, as stated above.

The case of the plaintiff is that because of the relationship between the parties the arrangement between them was that the

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plaintiff would get the profits which the defendant would earn in the execution of these contracts. This the learned Subordinate Judge thought to be very improbable. How could the defendant foot the bill, take the responsibility for the due performance of the contract and be also liable for the loss, if any while if any profits were earned, the entire amount would go to the plaintiff? The arrangement however has to be tested with reference to the conduct of the parties, as may be ascertained during the period when the contracts were being duly performed. Strange and peculiar arrangements may be made between parties under circumstances which are not normal or usual. If the probabilities of the case and the conduct of the parties make such a story wholly improbable, the Court will certainly reject the same, if such a story depends upon oral evidence only on the other hand, if there be undisputed documentary evidence which supports either wholly or in substantial part such an unusual arrangement between the parties and the circumstances of the case are such that in the peculiar conditions ruling the parties had agreed to such terms, the Court, however unusual the terms might be, would be required to give effect to the same.

The two important pieces of evidence in the case, apart from exhibit 1 to which reference has already been made are exhibits 2 and 3.

Exhibit 2 is a small chit of paper on which a statement of accounts was jotted down. This was admittedly written by Iswari Prosad Sarma, witness No. 6 for the defendant. On a perusal of the depositions of the defendant and of Iswari Prosad, it appears that according to them the plaintiff was claiming further payments and the defendant was resisting the same.

As stated at the opening, the defendant's case was that the plaintiff was to receive in addition to the pay a certain amount of bonus. Such bonus was stated to have been paid in two instalments of Rs. 200/- and Rs. 500/-. It is explained that to the defendant had not made a very large profit in the execution of these contracts a rough account was being made to satisfy by the plaintiff. The plaintiff, on the other hand, contends that this statement was drawn up in pursuance of the arrangement which had been made between him and the defendant and for

ascertainment of the total amount of profit earned which was being claimed by the plaintiff according to the arrangement. Iswari Prosad admitted to have written the entire chit except the date as it appears on the top of the chit. That the figures appearing in this chit could have been supplied by the defendant and the defendant alone and not by the plaintiff must be accepted. The amounts mentioned in this chit were lump sum amounts and the correct or accurate figures were not given. In some cases they were correct to the hundred, and in other cases to the rupees. According to Iswari Prosad and the defendant, the figures given in the chit were not the actual amounts but a rough estimate. From the figures given in the plaint taken along with the statements made in the written statement, it cannot but be said that the figures though not very accurate were very near the actual amounts.

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Let us now examine the contents of this document. We find that in addition to the total amount received by the defendant and the expenses incurred there are three other items.

Sales Tax payable on Rs. 56,900 @ 9

Pies per

Rs. 2,667/0/0

Income Tax payable on 10% of the bill,

i.e. on Rs. 5,690 @ 12½ per cent

Rs. 711/0/0

Interest on expenses (average) for

Rs. 23,400 @ 9 per cent per annum

Rs. 2,106/0/0

The total amount of expenses incurred when added up with the three items mentioned above comes to Rs. 52,284. This leaves a balance of Rs. 4,616/-, presumably indicating the estimated amount of profits. On the left hand corner at the bottom it is written:

"4500 paid."

It is explained by the defendant and the writer of this chit that the Sales Tax had not been paid till then but it was an estimated amount. Similarly no income tax had been assessed and the amount shown there was also an estimate. Half the

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amount of the total expenses incurred had been taken as obtained on loan without any materials being placed before the parties or discussed.

This chit with the contents aforesaid may fit in with a part of the plaintiff's story but seems highly improbable if the defendant's story be wholly true. Why should a servant engaged for a particular job be shown the details of the profits made unless the relationship between the parties was some thing different. This statement is consistant with the other story that in determining what the profits of the two contracts had been not only the actual amounts spent, but other liabilities which would fall upon the defendant should also be reasonably taken into consideration. The plaintiff's case is that on the introduction of these three items referred to above about taxes and interest the Parties fell out and left. The chit, exhibit 2, remained with the plaintiff—a very improbable story. If the defendants story were true, the defendant would take care that when for some reason or other such a statement was being discussed with the plaintiff, the plaintiff did not get hold of that chit of paper. Leaving the chit on the table would be inconsistent with the defendant's story and an improbable story.

As regards the figure and word "4500 paid" the defendant and the writer admit that this was not a contract figure as Rs. 4,500/- was not paid admittedly to the plaintiff. The plaintiffs story that a large amount out of the same had been paid to the son-in-law of the defendant cannot be accepted as the plaintiff has not placed any materials to show such payment having been made. We are not also concerned with the details of the items which would make up Rs. 4,500/-, as according to the defendant himself the figure cannot be explained, and such an amount had not been paid to the plaintiff.

We have to consider further implications of exhibit 2 again at a latter stage.

Next, as regards exhibit 3, a carbon copy of a statement of accounts under the signature of D. B. Pradhan, dated the 28th July, 1947, the position is not altogether clear except that the figures do not exactly tally with the figures appearing in the

Schedule to the Plaint as amounts of claim. Most of the figures appearing from February, 1946, to the end are the admitted payments either through the *baidar* or through the plaintiff by the defendant. Such a statement can certainly be prepared by the plaintiff who was in charge of supervision of the two contract works. Wherefrom, however, would in this statement prepared by the Plaintiff appear the different items of payment which had been made by the defendant directly to some or other of the suppliers for purchases effected? As the defendant has not produced his cash book it cannot be verified whether all these figures are accurate or not. No serious attempt, however, was made on behalf of the defendant to demonstrate that these different amounts about which the plaintiff could have no direct material to draw upon were imaginary ones. On the other hand, the ledger book of the Defendant which has not been accepted by the learned Subordinate Judge does not in material particulars, that is except in certain details only, differ from figures which are given by the plaintiff in the various statements.

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What does this conduct demonstrate? The Plaintiff was occupying *prima facie* a position higher and distinct from that of a simple *baidar*. Supervising at the site and drawing a certain pay per week or per month.

The learned Subordinate Judge was contract to this extent on an estimate of the evidence, subject to the observations already made by us, that in derogation of the case made by the defendant the Plaintiff had been engaged on a profit sharing basis for the conduct of the supervision work. However unusual such an arrangement may be when the defendant advanced the money required, from exhibits 2 and 3 (particularly from exhibit 2 and also to some extent from exhibit 3) it seems to be quite natural and to fit in with the probabilities of the case that the Plaintiff was occupying such a position.

Great reliance, however, was placed on behalf of the respondent on exhibit A, a letter written by the Plaintiff to the defendant on 27th November, 1946. It is contended that the tenor and the language used is inconsistent with the position which the Plaintiff wants to arrogate to himself so far as this particular business is concerned. We do not think that this

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letter is susceptible of such an interpretation. We cannot forget that the defendant remains the financier. Moneys are being advanced by him, and therefore the defendant being liable for the loss also, if that part of the story of the Plaintiff be accepted, the Plaintiff cannot but write to the defendant and act according to his directions. It is not that the Plaintiff has become the master of the situation.

Great emphasis was also laid on behalf of the defendant on one of the terms of the contract as between the government and the defendant to the effect that there could be no sub-contract given out by the defendant, and such an attempt would lead to the cancellation of the contract. The fact that some arrangement was being made between the Plaintiff and the defendant, and the government was being informed that the Plaintiff would be working as the agent of the defendant and represent the defendant before the engineering staff becomes consistent only with the conduct of the parties. They were mutually agreeing upon as to how the profits and the losses were to be shared or borne. So far as the government were concerned the defendant was and remained to be the responsible party. The defendant exercised sufficient control over the expenditure by keeping supply of funds in his own hands and as and when such funds become necessary. Such an arrangement could not be wholly improbable or impossible. The presence of such a term under the agreement of tender, as in exhibit D, would not raise such a strong presumption as to throw out the effect of exhibit 2 and to some extent of exhibit 3. To make all the items of evidence adduced consistent, the only conclusion to which a court can arrive is that there was an arrangement between the Plaintiff and the defendant whereby the Plaintiff was placed in charge of the contract works in question, the defendant supplying the funds and the Plaintiff becoming entitled to the profits.

How the profits were to be shared has to be determined. According to the defendants story it was to be in the shape of a bonus. According to the Plaintiff it would be the net profit. Even if we ignore the contents of exhibit 1, there are sufficient materials on the record from which we can determine as to what the profits should reasonably be to which only the Plaintiff will be

entitled to. The Plaintiff has claimed the entire amount being the difference between the amount of the bill and the amount actually spent up to a particular day. The claim is not only unreasonable but is also not warranted by the facts of the present case.

The question, therefore, arises whether in view of the prayer made in the plaint, the Court is entitled to allow any portion of the claim, or to decree the Plaintiffs. Suit in the form in which he can be entitled to. The learned Subordinate Judge has dismissed the suit on the ground that such a prayer is not maintainable. He has erred on this point.

It is now well settled and reference may be made to the leading case of *Hiron v. Mill* (1), where in it has been laid down that a court is entitled to grant a specific relief not inconsistent with the case as made but not specifically made, in the Plaint. This principle has been applied in this country in a number of decision beginning from *Hemendra Nath Roy v. Upendra Roy* (2).

Now it is to be decided whether in the frame of the suit as made by the Plaintiff in the body of the Plaint it is possible to consider the claim to which only the Plaintiff is entitled to. According to tenor of the Plaint, the Plaintiff had been engaged by the defendant in connection with the special works of the Victoria School and the Dow Hill School. He claimed to have been appointed as a sub-contractor. He referred to an agreement which had been entered into, on the 10th February, 1946. The terms of the contract were said to be that the profits would go to the Plaintiff, the defendant being the financier. The case which we have found, in agreement with the learned Subordinate Judge, is that the Plaintiff had been engaged by the defendant not as sub-contractor but for supervision of the two particular repair works. The defence case also was that the Plaintiff was engaged on a certain pay, and such amount is included within the amount of expenses in the different sets of accounts, and in addition some bonus dependent upon the extent of the profits. The claim which we have found the Plaintiff is entitled to is that in the words of the Plaintiff, the

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(1) 13 V.S. 114 (119).

(2) (1715) 22 C.L.J. 419 (451)

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Profits of the said contracts, and to adopt these words of the defendant, the bonus which equals the net profits would be earned. It is not that the defendants is taken by surprise, but the defendants had notice and had adduced evidence in support of his contention and in opposition to the claim as made by the Plaintiff. We, therefore, think that it is possible to allow the Plaintiff's claim subject to what we indicate hereafter.

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The next difficulty which the Plaintiff has to face is that there are no clear indication either in the correspondence or in the evidence except as indicated already, which has been adduced to indicate how the profits are to be assessed. It is well known that if there be no contract between the parties and one is made to work under another not for love but for remuneration, the Principles by which the Court would be governed would be analogous to those which regulate the assessment of remuneration for services as between a principal and an agent. The right of an agent to be remunerated for service is founded upon an express or implied contract between the principal and the agent. In the absence of a contract, if there be a custom as usage reference may be made to the same. In other cases the conduct of the parties and the circumstances of the particular case would determine how such remuneration is to be determined. It is now well settled also that if there be a specific contract assessment on the basis of *quantum meruit* will not be attracted on the other hand, it has been held that if the express contract for remuneration were a nullity by reason of its having been made, as for example, without authority, the agent will not thereby be prevented from recovery upon *quantum meruit*. See *Cravan Ellis v. Cannon Ltd.* (1). In India also similar principles have been applied and liability by implication is excluded by the contract being express. There can be no implied contract where there is express contract. See *Kissen Prosad v. Purnendu Narain* (2).

If, therefore, there is an express contract that remuneration will be paid, or that the Plaintiff, as in the present case, is entitled to the profits, it is not only open to the Court, but also it is its bounden duty to find out the equitable manner in which such profits are to be ascertained. Just as the defendant

(1) (1936) 2 K.B. 403

(2) 1911 16 C.W.N. 753 (761)

cannot get away without making reasonable payment, the Plaintiff also cannot take away the gross profits without compensating or providing for all the different items which should be taken into consideration if these two particular items of work had been considered to be independent items carried on by the defendant for the benefit of the Plaintiff.

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The income arising from these two works must be shown by the defendant in his income for the purpose of assessment of the Income tax and Sales tax. The defendant cannot escape his liability and the Plaintiff must provide sufficient funds in the accounting stage for the same. So far as the Income tax is concerned the amount together with the rate as mentioned in exhibit 2, which was drawn up under the direction of the defendant should be accepted as fair and proper.

So far as the Sales tax is concerned, Dr. Sen Gupta very fairly drew our attention to Rule 2, of the Bengal Sales Tax Rules 1941. Under the aforesaid Rule Sales tax becomes payable for repairing contracts on the basis of thirty per cent of the gross amount, and Sales tax at nine pies per rupee is assessable on the same. For the Sales tax, therefore, the gross profit should be reduced by Rs. 1,866/14/4 pies in place of what is shown in exhibit 2.

Next item for consideration is the interest on a portion of the Capital which was used for the contracts. The defendant stated that he had to borrow money. No doubt, the best evidence which could be produced by the defendant in support of such a case has not been produced. On other hand, the Plaintiff was to reap the entire profit which would accrue out of the utilisation of the Capital, and a certain percentage on the capital is not only the normal method of account, but also reasonable for determining what the net profit of a particular venture is. In that view, considering the circumstances of this particular case, that the total amount of expenses which was incurred by the defendant for the contract was about Rs. 47,000/- according to the Plaintiff's own case in the Plaintiff, and according to the defendant also it was near about that figure. The average amount which is shown in exhibit 2 should carry interest at six

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per cent per annum and do not nine per cent. The Plaintiff has already been paid in two instalments Rs. 200/- and Rs. 500/- respectively.

The result of such an accounting, on the calculation made by learned Advocates on both sides, would be as follows:

Sales Tax	Rs. 1,866/14/4 pies.
Income Tax	Rs. 711/-
Interest	Rs. 1,404/-
	Rs. 3,981/14/4 pies.
Less Received	Rs. 700/-
	Rs. 4,681/14/4 pies.
Expenses	Rs. 46,800/-
	Rs. 51,481/14/4 pies.
Total Receipts	Rs. 56,900/-
Deduct	Rs. 51,481/14/4 pies.

The result, therefore, is that the Plaintiff will be entitled to a decree for Rs. 5,418/1/8 pies. The Plaintiff will also be entitled to get Rs. 450/- for Court fees on the Plaint and also Rs. 450/- for Court fee on the memorandum of appeal. Other costs will be borne by the parties themselves. The defendant will pay to the Plaintiff Rs. 2,318/1/8 pies by the end of September, 1954, Rs. 2,000/- by the end of September, 1955, and Rs. 2,000/- by the end of September, 1956, and in default of any one of the said instalments the entire amount will become payable with interest at six per cent. per annum from the date of this Court.

Renupada Mukherjee, J.:—I agree.

*Appeal allowed: Suit
decreed in part.*

P.D.

APPELLATE CIVIL.

Before Mr. Justice G. N. Das and Mr. Justice
Renupada Mukherjee.

TINCOURIE MAZUMDAR & ORS.

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SRIKISHAN CHAND BORAI & ORS.

1953

April, 17.

Article 80, Schedule I, Limitation Act, failure to take delivery of possession through Court by the auction purchaser—Whether previous title by the judgment debtor revives—Limitation where judgment-debtors in possession at the date of the sale—Article 138, Schedule I, and Section 28 Limitation Act applicable.

Failure, on the part of the auction purchaser to take delivery of possession through Court within the time limited by Article 180, Schedule I of the Limitation Act does not revive in the judgment-debtor his previous title after the lapse of three years from the date of the auction purchase.

Article 180 of the Limitation Act does not prescribe the period of limitation for the institution of the suit by the auction purchaser. It merely prescribes the period of limitation for an application for delivery of possession to the auction purchaser. The period of limitation prescribed for a suit by an auction purchaser in a case where the judgment-debtors were in possession at the date of the sale is prescribed by Article 138 of the Limitation Act which prescribes the period of twelve years from the date when the sale becomes absolute.

Kailash Chandra Tarafdar v. Gopal Chandra Poddar (1) explained.

Debi Prosad Bhakat v. Satish Chandra Ghosh (2), *Fakirappa Malamani v. Nigappa Matti* (3) referred.

The material facts will appear from the judgment.

* Appeal from appellate Decree No. 201 of 1949 against the decree of S. N. Guha Roy, Esq., District Judge, of Zillah 24 Parganas, at Alipore, in Title Appeal No. 176 of 1948, dated the 4th of December, 1948, affirming the Decree of J. P. Mukherjee, Esq., Subordinate Judge, 6th Court Alipore, dated the 14th of January, 1948.

(1) (1926) 80 C.W.N. 649 (F.B.).

(2) (1949) 77 C.L.J. 395 (C). Appeal to move to the High Court.

(3) (1943) A.F.R. Bom. 263.

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S. C. Janah and Basanta Kumar Panda for the Appellant.

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Boral & Ors.*A. D. Mukherjee and Dwijendra Nath Mukherjee* for the Respondent.

The judgment of the Court was as follows:—

G. N. Das, J.—This is an appeal by the Plaintiff's against the decision of Mr. S. N. Guha Roy, as he then was, learned District Judge, 24-Parganas, whereby he affirmed the decision of Mr. J. P. Mukherjee, learned Subordinate Judge, 6th Court, Alipore dismissing the Plaintiff's suit for Petition on the ground that the Plaintiff's have failed to prove their title to 12 annas share claimed by them.

G. N. Das, J.
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At this stage the question in controversy has narrowed down to a question of law. The question of law arises on the following facts.

The property in dispute belonged to one Kedarnath who died in 1918 having been survived by his four sons Monilal, Chunilal, Tinkari and Satish. Monilal died without leaving any issue. Chunilal's widow is Sushila who figures as Plaintiff No. 2. Tinkari is Plaintiff No 1. Kedarnath executed a mortgage of the disputed property in favour of the predecessor in interest of one Pannalal Banerjee. To enforce the mortgage debt a suit was instituted and a decree was obtained and in execution of the said decree the mortgage property was brought to sale on the 10th of July, 1931 and was purchased by the decree holder. The sale was confirmed on the 10th of September 1931. Pannalal—acquired title under the said auction sale.

Before the learned District Judge the argument proceed on the footing that no delivery of possession through Court was taken by Pannalal as required by Article 180 Schedule I, of the Indian Limitation Act. Pannalal entered into an agreement for sale of his purchased property with Satish. This was on the 29th of May, 1954. Thereafter on the 29th September, 1934, Pannalal executed a conveyance in pursuance of the said agreement for sale in favour of Satish. On the 9th October, 1936, Satish sold his title acquired by the purchase to Defendant No. 1.

Defendant No. 1 in his turn sold a portion of his purchased right to Defendant No. 2 by a Kobala dated 28th May, 1946. The present Suit for partition was instituted on the 14th December 1946. The Plaintiff's as I have already observed, are Tinkari and Sushila who claim 5/12/- annas share, the remaining four annas share according to them, remained with Satish. It is the basis of their claim, that as the auction purchaser Pannalal did not take delivery of possession, their pre-existing title revived on the expiration of three years from the date of the auction purchase by Pannalal, delivery of possession having been taken by Pannalal. *Inter alia* the defence to the Suit was that the Plaintiff's title was lost by the auction sale and that title has vested in Defendants No. 1 and No. 2 by the Conveyance referred to above.

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The question therefore is, what is the effect of a failure on the part of the auction purchaser to take delivery of possession within 3 years as required by Article 180 of the Indian Limitation Act. As regards possession, the finding of the Courts below is that the Plaintiff's have occasionally realised rent from some of the tenants in occupation of portions of the disputed property. The finding further is that Satish was in possession of a good part of the disputed property and that such possession now rests with defendants No. 1 and 2.

Both the Courts below have held that the Plaintiff's have failed to establish their title to 12 annas share.

In this Court Mr. Janah learned Advocate for the appellant has contended that the effect of the auction-purchaser, are not taking delivery of possession through Court within the time limited by Article 180 is to revive in the judgment-debtors their previous title after the lapse of 3 years from the date of the auction purchase.

It is not pretended that the Plaintiff's acquired title by adverse possession of 5/12/- annas share by possession for the requisite period of 12 years or more. The contention is, as I have said, based on the ground that as the auction purchaser becomes disentitled to recover possession through Court after the lapse of 3 years from the date of the auction purchase the title of the

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judgment debtor which was lost by the auction sale revives. Reliance was placed on two passages in the judgments of the Full Bench in the case of *Kailash Chandra Tarafdar v. Gopal Chandra Poddar* (1). These passages merely lay down that the mere fact of an auction purchaser does not create in the auction purchaser a complete title. What is meant by the passages referred to is that in order that the auction purchaser may reap the fruits of his auction purchase he must follow it up by an application for delivery of possession in order that his title to the land and his right to possession may become absolute. These passages do not however show that the right of the judgment debtor revives after the lapse of three years from the date of the auction purchase in case the auction purchaser fails to take delivery of possession through Court as required by Article 180 of the Limitation Act. On the other hand the case of *Debi Prasad Bhakat v. Satish Chandra Ghosh* (2), indicates that mere failure on the part of an auction purchaser to take delivery of possession within the time limited by Article 180 of Schedule I of the Limitation Act is to make it difficult for him to seek the assistance of the Court in order to put him into possession. In spite of his failure in that behalf he may get into possession by an amicable arrangement with the judgment debtor or in any other way. His title remains alive unless it is lost either by way of a sale gift etc. or by operation of some statute, for example section 28 of the Limitation Act. In the Court below an argument was raised that section 28 of the Limitation Act was attracted to the fact of this case. Mr. Janah, learned Advocate for the appellants, has very fairly conceded the position that it is difficult for him to rely on the express terms of Section 28 which runs as follows:

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. It is undoubtedly true, as was pointed out in the case of *Fakirappa Malamani v.* to (1) (1936) 30 C.W.N. 649, 20 C.L.J. 1665 and 1666 of Calcutta and (2) (1943) 77 C.L.J. 395, that the right to such property shall be extinguished at the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. It is undoubtedly true, as was pointed out in the case of *Fakirappa Malamani v.*

Nigappa Matti (1), that if a judgment debtor or any person claiming under him remains in possession for the requisite period limited by Section 28 of the Limitation Act for the institution of a suit for recovery of possession, the right of the auction purchaser would be extinguished and the right to extinguished would become vested in the adverse possessor at the expiration of the period so limited. In this case Article 180 of the Limitation Act does not prescribe the period of limitation for the institution of a suit by the auction purchaser. Article 180 merely prescribed the period of limitation for an application for delivery of possession to the auction purchaser. The period of limitation prescribed for a suit by an auction purchaser in a case like the present where the judgment debtors were in possession at the date of the sale is prescribed by Article 138 of the Limitation Act which prescribes the period of 12 years from the date when the sale becomes absolute. In this case the judgment debtors did not remain in possession of the property for the said period of 12 years. The judgment debtors viz. Tinkari and Sushila cannot therefore claim to have acquired any title under Section 28 of the Limitation Act.

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In my opinion the view taken by the learned District Judge is correct and his judgment must be affirmed.

The result therefore is that this appeal fails and is dismissed with costs.

Renupada Mukherjee, J.:—I agree.

P.D.

*Appeal dismissed
with costs.*

(1) (1943) A.I.R. Bom. 265.

ORIGINAL CIVIL.

Before Mr. Justice Bachawat.

Civil.

SATYANARAIN BISWANATH

v.

HARAKCHAND RUPCHAND.*

1954

July, 26.

Arbitration—Reference under the Rules of Bengal Chamber of Commerce—Setting aside an award—Time to make the award expired—Appointment of one new arbitrator in place one former arbitrator—Constitution of the Second Court.

Held (i) the Registrar under the rules of the Bengal Chamber of Commerce became bound to appoint and substitute new arbitrators in place of the former arbitrators after the time to make the award expired.

(ii) Under Rule VII of the Bengal Chamber of Commerce the Registrar became bound to constitute another court and such Court must consist of new arbitrators and no one of the previous Court should be there.

The material facts will appear from the judgment.

A. C. Bhabra for the Appellant.

Ajit Sarkar for the Respondent.

The Judgment of the Court was as follows:—

R. S. Bachawat, J.:—This is an application to declare void and set aside the Award of the Bengal Chamber of Commerce. The dispute relates to a contract dated November 30, 1951, which contains the usual arbitration clause for reference of the disputes under the contract to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration. The respondent referred the disputes relating to the contract to the arbitration of the Bengal Chamber of Commerce. The relevant rules of the Tribunal of Arbitration are as follows:—

“V. (1) In every case where a dispute or difference has arisen between parties who have agreed that such dis-

* Re: Arbitration Award No. 7 of 1954.

pute or difference shall be referred for decision to the Chamber or the Tribunal, an application for arbitration may be addressed by either party to the Registrar which application, in the case of disputes relating to piece-goods shall be in such form as the Committee of the Chamber may from time to time prescribe.

(2) On receipt of such application, the Registrar shall constitute a Court for the adjudication of the dispute.

VII. If the Court have allowed the time or extended time to expire without making any award, and without having signified to the Registrar that they cannot agree, the Registrar shall constitute in manner aforesaid another Court which shall proceed with the arbitration and shall be at liberty to act upon the record of the proceedings as then existing and on the evidence, if any, then taken in the arbitration or to commence the arbitration *de novo*.

X. If any appointed arbitrator or umpire neglects or refuses to act, or dies or becomes incapable of acting, the Registrar shall substitute and appoint a new Arbitrator or Umpire as the case may be in manner aforesaid and the Court so reconstituted shall proceed with the arbitration with liberty to act on the record of the proceedings as then existing and on the evidence, if any then taken in the arbitration, or to commence the proceedings *de novo*.

XXV. The Court shall make its award in writing within four months after entering on the reference or on or before any later day to which the Court with the consent of all parties concerned in the proceedings, by any writing signed by them, may from time to time, enlarge its time therefor or any extension of time granted by the Court of Judicature at Fort William in Bengal.

On June 6, 1952, the Registrar acting under Rule V constituted a Court consisting of Mr. J. L. Jamison and Mr. I. D. C. Buist. On the same day this Court entered on the reference. The time of this Court to make the award expired on October 6, 1952. Still correspondence between the parties

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and the Registrar of the Chamber under the directions of this Court went on until July, 1953. Mr. Buist then proceeded on leave and the Registrar on August 4, 1953, appointed Mr. H. A. Luke in place of Mr. Buist under Rule X.

The endorsements on the appointment sheet are as follows:—

"I propose to appoint Messrs. J. I. Jamieson and I.D.C. Buist as arbitrators, and will be glad to know if you have any suggestions to offer.

Sd/- D. C. FAIRBAIRNE,
Registrar.

Court appointed as above.

Sd/- D. C. FAIRBAIRNE,
Registrar, 6/6/52.

Mr. Buist having proceeded on leave, I appoint Mr. H. A. Luke in his place under Rule X.

Sd/- D. C. FAIRBAIRNE,
Registrar, 4/8/53.

On 8.10.53 the Court consisting of Mr. Jamieson and Mr. Luke made the award.

In my opinion, when Mr. Jamieson and Buist allowed the time to expire, the Registrar, under the rules, became bound to appoint and substitute new arbitrators in their place.

If we look at Rule VII, the Registrar became bound to constitute another Court. It is clear from several decisions of this Court that if the first Court consists of A and B, the Second Court constituted under Rule VII cannot consist of A and B. I am also of the opinion that such Second Court cannot consist of C a new arbitrator and either A or B. The Registrar must appoint persons other than A and B as arbitrators in place of A and B. The observations of Das Gupta, J. in *Ramnath Narendranath v. Namjee Shamjee* (1), support this conclusion.

We come to the same conclusion if we look at Rule X. Under that rule, if any appointed arbitrator neglects to act the

(1) (1953) A.I.R. Calc. 787 (790).

Registrar must substitute and appoint a new arbitrator. The word "any" means one or more out of several and includes all. See *Jokhiram Kaya v. Ganeshamdas Kedarnath* (1). Where there are two arbitrators and both of them neglect to act the Registrar must substitute and appoint new arbitrators in their place. The arbitrators neglect to act if they allow the time to make their award to expire and do not make their award. *Willoughby v. Willoughby* (2), *Narendra Nath v. Brojeswari* (3). They neglect to act though the time expires through no fault or theirs. Neglect in this context do not imply any degree of blame. Under Rule X also the Registrar must substitute and appoint new arbitrators in place of the arbitrators who allowed the time to expire and therefore neglected to act. Both under Rules VII and X the Registrar was bound to appoint new arbitrators in place of Mr. Jamieson and Mr. Buist when they allowed the time to expire.

The Registrar did not appoint a new arbitrator in place of Mr. Jamieson.

The Court consisting of Mr. Jamieson and Mr. Luke had no authority to make the award. The award is therefore invalid.

The petitioner urged certain other contentions in support of this application. By consent the point with regard to the constitution of the Court has been tried first without prejudice to the other contentions raised by the parties in the pleadings.

I pass the following order:—

I adjudge and declare that the award No. 1086 of 1953, being case No. 407 of 1952 of the Bengal Chamber of Commerce & Industry, is null and void on the sole ground that the Court which made the award was defectively constituted and had no authority to make the award. The order is without prejudice to the other contentions raised by the parties in this application.

The respondent must pay the petitioner the cost of this application.

B. M. Bagaria, Solicitor for the Applicant.

K. K. Dutta & Co., Solicitors for the Respondent.

(1) (1920) 25 C.W.N. 62 at 65-6.

(2) (1847) 16 J.Q.B. 241; (3) (1914) A.I.R. Calc. 448.

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CIVIL REVISION.

Before Mr. Justice Renupada Mukherjee.

GAJANANDA CHOUDHURY

v.

BHOLANATH BHAGAT.*

1954.

July, 21.

West Bengal Premises Rent Control Act, 1950—Paragraph 1(a) of Schedule A—Section 17, Sub-section (3)—Calcutta House Rent Control Order, 1943—Paragraphs 3 and 7—Fixation of rent by the controller on consent of parties.

Upon an application for fixation of rent of certain premises under paragraphs 3 and 7 of the Calcutta House Rent Control Order, 1943, the Rent Controller on 18th May, 1944, fixed the rent at Rs. 80/- per month on consent of parties. Notwithstanding such fixation of rent the landlord continued to realise rent at the rate of Rs. 140/- per month. The tenant, therefore, applied to the Rent Controller for fixation of standard rent. Thereupon on 20th March, 1950, the rent controller fixed the standard rent at Rs. 90/- per month, treating the rent fixed on 18th May, 1944, as "basic rent" within the meaning of Paragraph 1(a) of Schedule 'A' of West Bengal Premises Rent Control Act, 1950. Although the proceeding for fixing standard rent was instituted when the Act of 1948 was in operation, the proceeding being pending when the Act of 1950 came into operation, the standard rent was fixed in accordance with the Provisions laid down by the Act of 1950 in view of sub-section (3) of section 17 of the Act of 1950.

It was contended on behalf of the landlord on the authority of the decision in the case of *Punamchand Mohta v. S. Mukherjee* (1) that the order fixing rent dated 18th May, 1944, having been made on consent of parties, the fixation of rent was not by the Rent Controller within the meaning of paragraph 1(a) of Schedule 'A' of the Act of 1950, but was a fixation of rent by the parties themselves. This contention was not given effect to and the decision in *Punamchand Mohta's Case* (1), was distinguished. It was held that the rent fixed on 18th May, 1944, was fixed by the Rent Controller himself and the fact that he accepted the agreement of the parties as the basis of his fixation did not make it any the less a fixation by himself.

Application for Revision by the Petitioner for setting aside the judgment and Order of the Chief Judge of the Court of Small Causes,

* Civil Revision, No. 1130 of 1954 against the decision dated 28-5-53 of the Chief Judge of the Court of Small Causes, Calcutta, in R. C. Appeal No 860 of 50 against the decision dated 20-3-50 of the Additional Rent Controller, Calcutta, in cases Nos 3793A and 125A of 1949.

(1) (1951) 56 C.W.N. 15.

Calcutta, passed in appeal against the Judgment and Order of the Rent Controller fixing Standard rent.

The material facts appear from the judgment.

Charnu Chandra Ganguly and Aniya Kumar Chatterjee for the Petitioner.

Bejoy Kumar Bhose for the Opposite Party.

The Judgment of the Court was as follows:—

Renupada Mukherjee, J.—This Rule was issued at the instance of Petitioner Gajananda Choudhury, a tenant under Opposite Party, in respect of a Portion of Premises No. 148, Harrison Road, Calcutta.

In order to appreciate the exact points in controversy it would be necessary to set out the following admitted facts. The Petitioner had been holding the premises mentioned above under the opposite party from before the 1st December, 1941, at a monthly rent of Rs. 120/-. The rent was reduced to Rs. 65/- per month at the time of the general exodus of people from Calcutta. Thereafter on or about the 10th April, 1944, the landlord applied for fixation of rent at Rs. 120/- per month with effect from the 1st April, 1944. This application was apparently made under paragraphs 3 and 7 of the Calcutta House Rent Control Order, 1943. Mr. Amin Ahmad who was Rent Controller at the time fixed the rent at Rs. 80/- per month by consent of parties on the 18th May, 1944. The Petitioner's case is that notwithstanding the above fixation of rent the landlord began to realise rent at Rs. 140/- per month with effect from April, 1947, and so he applied to the Rent Controller for fixation of standard rent on the basis of the rent already fixed by Mr. Amin Ahmad. The landlord also filed a counter application alleging that the rent fixed by Mr. Amin Ahmad was too low and contending that Rs. 250/- per month was the fair and reasonable rent in December, 1941. Both the application were heard together, and the Additional Rent Controller fixed the Standard rent at Rs. 90/- per month by an order, dated the 20th March, 1950. He treated the rent fixed by Mr. Amin Ahmad as the basic rent for the purpose of deter-

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mining the standard rent. An appeal was preferred before the Chief Judge against the above order which was dismissed, and the landlord came up to High Court in revision. The High Court thereupon set aside the order of the Chief Judge and directed a re-hearing of the appeal which was accordingly heard by the Chief Judge of the Court of Small Causes, Calcutta, who fixed the standard rent at Rs. 145/3/- per month. The tenant petitioner has come up to this Court in revision, alleging that the Chief Judge committed error in law by not accepting the rent fixed by Mr. Amin Ahmad as the basic rent within the meaning of paragraph 1(a) of Schedule "A" of the West Bengal Premises Rent Control Act, 1950.

It is not disputed that although the proceedings were instituted when the West Bengal Premises Rent Control Act of 1948 was in operation, the question of fixation of the standard rent would be governed by sub-section (3) of section 17 of the Rent Control Act of 1950. That sub-section runs in the following terms:

"If at the date when this Act into force proceeding for fixing standard rent is pending before the Controller or in appeal, the Controller or the appellate officer shall fix the standard rent in accordance with the provisions as laid down by this Act."

The provisions for determining the standard rent have been laid down in Schedule "A" of the Act of 1950. Paragraph 1(a) of the said Schedule is relevant for our purpose and may be quoted here:

"(1) In this Schedule "basic rent" in relation to any premises means—

(a) Where the rent of any premises has been fixed by the Controller under the Bengal House Rent Control Order, 1942, or the Calcutta House Rent Control Order, 1943, or the Calcutta Rent Ordinance, 1946, the rent so fixed;

Mr. Ganguli appearing on behalf of the Petitioner contended that the rent of the premises was already fixed by the Rent Controller at Rs. 80/- under the Calcutta House Rent

Control Order, 1943, and that rent should be accepted as the basic rent. The operative portion of the order passed by the Rent Controller in the case mentioned above runs as follows:—

"By consent the rent is fixed at Rs. 80/- per month with effect from 1st December, 1943, and I allow the same."

Mr. Bhose appearing on behalf of the opposite party contended that the order having been passed on consent of parties cannot be regarded as an order made by the Rent Controller under the provisions of the Calcutta House Rent Control Order, 1943, inasmuch as he did not institute any enquiry for fixing the rent, and he merely fixed the rent which was suggested by the parties.

Mr. Bhose argued that this was a fixation of rent by the parties themselves by agreement and not by the Rent Controller. In support of his contention he relied on a case reported in *Gunamchand Mohta v. S. Mukherjee* (1). Mr. Ganguli appearing on behalf of the petitioner questioned the correctness of the above decision. Without entering into the merits of Mr. Ganguli's contention it may be pointed out that upon the facts the present case is clearly distinguishable from the case decided by Bose, J. and reported in *Gunam Mohta's* (1).

In the latter case the consent order was passed by the Rent Controller in the following terms on an application by the tenant for fixation of the standard rent under the provisions of the West Bengal Premises Rent Control Act of 1950:

"Applicants' Pleader Babu S. K. Bose present. Opposite Party's Advocate, Sri M. P. Khettry present" with general power. The case is disposed of in terms of the Joint Petition filed by the parties today. The Joint Petition be kept with the record."

In holding that the above order did not amount to a determination of the standard rent by the Rent Controller, Bose, J. made the following observations at page 17 of the report.

"In the present case that Rent Controller did not determine the standard rent as defined in section 2(10) of the Act according

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(1) (1951), 56 C.W.N. 25.

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to Schedule A of the Act. He did not start any inquiry at all under the Act. He disposed of the case in terms of the joint petition. It is suggested that the respondent proceeded under section 9(G) of the Act. I find it difficult to accept the contention. Clause (G) contemplates that the Controller must apply his mind, enquire into the fairness and reasonableness of the rent to be fixed. There is nothing to show that the respondent proceeded under this clause.

The consent order in the present case was passed under the Calcutta House Rent Control Order, 1943, paragraphs 7(1) and 3 which mainly provide for fixation of rent by the Rent Controller under that order may be quoted here:

"7. (1). The Controller may, in cases other than those provided for in paragraph 4 on his motion or on application made to him by any person interested, fix the rent chargeable under paragraph 3 in respect of any house.

"8. No landlord with effect from the first day of December, 1941 (hereinafter referred to as the prescribed date) shall be deemed to have been entitled to charge or shall charge a rate of rent which exceeds by more than ten per cent the rent that was being paid on that date or in respect of any house which was not let out on that date, a rate of rent which exceeds by more than ten per cent the rent which would, in the opinion of the controller, have been paid on that date, if the house had been let out:

Provided that no enhancement of rent shall be allowed in respect of any house after the commencement of this order except in so far as has been provided for in paragraph 8 of this order:

Provided further that nothing in this paragraph shall apply to any periodical increment of rent accrued due under any written agreement entered into before the prescribed date."

The above paragraphs of the order of 1943 will show the maximum limit up to which rent could be fixed by the Rent Controller. The expression "standard rent" is conspicuous by

its absence in the order, and the order does not provide that the Rent Controller should adopt any particular procedure or make any enquiry for fixing the rent of any particular holding or premises. He was authorised under the order to fix the rent of any premises either on his own motion, or on application by any person interested in the premises up to a certain limit, and no procedure having been fixed by the order of 1943 for fixation of the rent, the Rent Controller was certainly empowered to fix it by consent of parties, and if he did so, it must be regarded as his own fixation, and it should be accepted as the basic rent within the meaning of paragraph 1(a) of Schedule "A" of the West Bengal Premises Rent Control Act of 1950. That being so, the appellate officer in the present case was not justified in ignoring that rent and fixing the standard rent on a different basis.

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Mr. Ganguli on behalf of the Petitioner further wanted to distinguish the present case on the ground that Rent Controller Mr. Amin Ahmad who disposed of the case under the order of 1943 expressly sanctioned the rent agreed upon by the parties by saying that he allowed that rent which showed that he applied his mind judicially to the facts of the case. Mr. Ganguli contended that such an express approval was wanting in the case decided by Bose, J. This, in my mind, is a distinction without any appreciable difference, because in both the cases the Rent Controller himself disposed of the matter on the agreement of parties which shows that the compromise arrived at by the parties was accepted by him.

Mr. Bhose also drew my attention to a case reported in *Harrison Road Properties v. Ramdhandas Jhahoria* (1). He contended that P. B. Mukherjee, J. who disposed of that case held upon a construction of section 18(1) of West Bengal Premises Rent Control Act of 1950, that the power given to Court to vacate decrees under that section is confined only to decrees which the Court after consideration of the circumstances and in the exercise of its judicial function had made in invitum as regards the tenant and that consent decree are excluded from the operation of the section. This decision was given by P. B.

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Mukherji, J. in agreement with the view expressed in *Wellesly v. White* (1). The last mentioned English case deals with the interpretation of section 5(3) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, which runs in the following terms:

"Where any order or judgment has been made or given before the passing of this Act, but not executed, and, in the opinion of the Court, the order or judgment would not have been made or given if this Act had been enforce at the time when such order or judgment was made or given, the Court may, on application by the tenant, rescind or vary such order or judgment in such manner as the Court may think fit for the purpose of giving effect to this Act."

It was held in that case that the sub-section applied only to an order or judgment made or given *in invitum* as regards the tenant, and not to an order or judgment made or given by consent of the parties. A consent order, according to that decision, is not an order within the meaning of section 5(3) and the order must embody the independent opinion of the Judge.

Mr. Bhose also drew my attention to another English Case, *Barton v. Fincham* (2), in which it was held that the jurisdiction of the Court to make an order for possession under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was restricted by that enactment, and no order for possession could be made unless one of the conditions laid down in section 5 was fulfilled.

The above English cases are not applicable to the facts of the present case, because, as I have already held, the fixation of rent on consent by the Rent Controller under the Calcutta House Rent Control Order, 1943, was a fixation by himself under that order, and so the condition for the operation of paragraph 1(a) of Schedule A of the Rent Control Act of 1950 has been fulfilled.

(1) (1921) 2 K.B. 204.

(2) (1921) 2 K.B. 291.

Turning now to the decision of P. B. Mukherji, J. reported in *Harrison Road Properties v. Ramdhandas Jashona* (1), it will appear that section 18(1) of the Rent Control Act of 1950 expressly limits the operation of the section to some particular classes of decrees of ejectment. Section 18(1) runs as follows:—

18(1). Where any decree for recovery of possession of any premises has been made, "on the ground that the interest of the tenant in such premises has been *ipso facto* determined under the provisions of sub-section (3) of section 12 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, but the possession of such premises has not been recovered from the tenant, the tenant may apply to the trial Court within sixty days of the coming into force of this Act for vacating the decree for ejectment against him and within such period no order for delivery of possession shall be made by any Court, nor if an application is made by the tenant under this sub-section till the application has been dismissed under sub-section (4)."

The portion within inverted commas has been emphasised in italics in the section itself, and it clearly indicates that the operation of the section is confined to decrees made on the ground that the interest of the tenant in such premises has been *ipso facto* determined under the provisions of sub-section 3 of section 12 of the West Bengal Premises Rent Control Act of 1948. A decree passed merely on the consent of the tenant, but not on an adjudication about the *ipso facto* determination of the tenancy does not certainly come within the scope of the section, and so P. B. Mukherji, J. if I may say so with propriety, was quite justified in holding that consent decrees are excluded from the operation of section 18(1) of the Rent Control Act of 1950. The same cannot be said with regard to a fixation of rent made by the Rent Controller under the order of 1943 with the consent of parties. All that paragraph 1(a) of Schedule A of the Rent Control Act of 1950 says is that the basic rent in relation to any premises means—where the rent of any particular premises has been fixed by the Controller under the Bengal House Rent Control Order, 1942, or the Calcutta House Rent Control Order, 1943, or the Calcutta Rent Ordinance 1946, the rent so fixed. In this particular case, the rent fixed in the previous Rent Control Case by Mr. Amin

(1) (1950) 85 C.L.J. 371.

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Ahmad, though fixed on consent was a fixation by the Rent Controller under the order of 1948, and the fact that he accepted the agreement of the parties as the basis of his fixation does not make it any the less a fixation by himself.

Mr. Ganguli appearing on behalf of the petitioner also drew my attention to in *Suresh Chandra Roy v. Tarak Bala Devi* (1). That case gives a substantial measure of support to the view I am taking, because Chunder, J. observed therein that the rent fixed by consent under the Calcutta Rent Ordinance, 1946 (Ordinance No. V of 1946) should be accepted as the basic rent as defined in paragraph 1(a) of Schedule A of the Rent Control Act of 1950. In view of my interpretation of paragraph 1(a) of Schedule A of the Rent Control Act of 1950, I am of opinion that the learned Chief Judge who heard the appeal in this case made an error in law by not accepting Rs. 80/- previously fixed on consent by Rent Controller Mr. Amin Ahmad as the basic rent and by accepting Rs. 120/- as the basic rent of the premises. That judgment must be set aside and the judgment of the Additional Rent Controller should be restored.

The Additional Rent Controller fixed the standard rent with effect from the 1st December, 1949, because the application for fixation of the standard rent was made by the tenant in December, 1949. Mr. Ganguli appearing on behalf of the petitioner contended that the standard rent should have been given effect to with effect from the 31st March, 1950, on which date the Rent Control Act of 1950 came into operation. There is no substance in this contention, and regard being had to the date of filing of the application the Additional Rent Controller was justified in fixing the Standard rent with effect from the 1st December, 1949.

In the result, this Rule must be made absolute. It is accordingly made absolute and the order of the learned Chief Judge of the Court of Small causes, Calcutta, is hereby set aside and the order of Additional Rent Controller passed on the 20th March, 1950 is hereby restored and affirmed.

The petitioner will get the costs of this Rule from the Opposite Party, hearing fee being assessed at three gold mohurs.

P.K.D. *Rule made absolute.*

(1) Unreported decision of Chunder, J. in Civil Rule No. 2855 of 1951, dated the 18th December, 1952.

ORIGINAL CIVIL

Before Mr. Justice P. B. Mukharji.

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August 31.

Discharge of surety—Notice to surety, when necessary—Indian Contract Act, Section 139—Crucial factor in the Section.

If an employer wants to retain in service a dishonest servant even after his dishonesty has been proved then the employer must give the guarantor notice of the act of infidelity of the servant so that the guarantor may get an opportunity to say whether he would continue his guarantee or not. If the guarantor is not given this opportunity by the employer then the guarantor cannot be held to his original guarantee. In order that a surety may be discharged, the continued employment of a servant without notice to surety must be after the creditor or employer has proof of the servant's acts of dishonesty and not merely suspicion or reports about them.

Section 139 of the Indian Contract Act will not also help the surety because in order to attract Section 139 of the Indian Contract Act there must not only be either an act inconsistent with the rights of the surety or an omission to do an act which it is the creditor's or employer's duty to do but also the impairment of the eventual remedy of the surety against the principal debtors. This impairment of the surety's eventual remedy against the principal debtor is the crucial factor in the Section. In an action where the surety himself sues the principal debtor thereby proving that his eventual remedy against the principal debtor has not been impaired, he cannot be heard to say that he has been discharged on the ground that his eventual remedy against the principal debtor has been impaired.

Suit by Surety's heir for recovery of certain G. P. Notes deposited by surety as security under a security bond and of interest due thereon or in the alternative for recovery of the value of the G. P. Notes and of interest.

The material facts will appear from the judgment:

T. P. Das and P. C. Sen for the Plaintiff.

B. Das and Dilip Sen for Defendant Bank.

The judgment of the Court was as follows:—

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P. B. Mukharji, J.—This suit is concerned with the effect of what may be called a contract in the nature of a fidelity bond or a guarantee. One Rajani Kanta Pal, since deceased, signed a bond with the Comilla Banking Corporation Limited now amalgamated with and represented by the United Bank of India Ltd. By this bond dated the 8th August 1944 Rajani, in consideration of the appointment of his relation the second defendant Nishikanta Pal to the post of a cashier and in consideration of the security for the due discharge of Nishikanta's duties, executed as guarantor the security bond for Rs. 10,000/- for himself, his heirs, executors, and assigns.

This suit is brought by Radha Kanta Pal, son of Rajani who died on the 18th April 1945. In this suit the Plaintiff claims against the Bank the 3½% G. P. Notes of 1900 No. 890435 for Rs. 5,000/- and also another, 3½% G. P. Note of 1865 No. CA-010581 for Rs. 5,000/-. These Government Promissory Notes were deposited with the Bank by Rajani as security under the said security bond. The plaintiff also claims interest on the first Government Promissory Notes from the 24th April 1939 and on the Second Promissory Note from the 21st February, 1944. There is an alternative claim for the sum of Rs. 10,000/- being the value of these two Government Promissory Notes and for the sum of Rs. 2,289-1-6 being the interest at the rate of 3½% per annum from the dates that I have just mentioned.

The basis of the plaintiff's claim is that the services of Nishikanta Pal were terminated on the 4th December 1946, but the deposit money in the shape of the Government Promissory Notes has not been returned to the plaintiff.

The defence of the Bank is that Nishikanta is responsible for shortage of the Bank's cash amounting to Rs. 8,800/- and the Bank is therefore entitled to deduct that money out of the security deposit. The plaintiff's allegation is that neither Rajani nor he had any knowledge of the defalcation or breach of duty committed by Nishikanta and that the Bank gave no notice to either of them about any such defalcation or breach of duty. In the plaint the plaintiff expressly says that he does not admit that Nishikanta had made any shortage in cash. He also contends that in any event he is not liable for such de-

falcation or shortage, if any, caused by Nishikanta Pal.

The defendant Bank in its written statement after setting out the terms of the security bond pleads that Nishikanta by serving as a cashier was found to be responsible for shortage of two sums of money one of Rs. 600/- on the 15th August 1946 and the other of Rs. 8,200/- on the 28th November 1946. The Bank also pleads that the defendant Nishikanta wrongfully on the breach of the terms of his appointment left his post as cashier on the 4th December 1946 without any notice, and failed to pay or make good the said sum of Rs. 8,800/- in spite of demands. The Bank's case is that it has adjusted the sum of Rs. 5,286-15-10 against the said sum of Rs. 8,800/-. This sum of Rs. 5,286-15-10 is the proceeds of the conversion of the Government Promissory Note No. CA-006473 and the balance still payable by the Defendant Nishikanta is Rs. 3,513-2-0 for which the Bank claims to be reimbursed out of the other G. P. Note as security deposit and the sum of Rs. 306/- being the surrender value of the insurance policy of Nishikanta and a further sum of Rs. 294-14-3 being the outstanding balance of the provident fund of the defendant Nishikanta which are kept in the suspense account.

The defendants to this suit are first the Bank and secondly Nishikanta Pal. The defendant Nishikanta Pal has not entered appearance and is not defending this suit. Defendant Nishikanta Pal is the nephew of the plaintiff being the son of the plaintiff's paternal uncle's daughter.

The following issues were settled by this Court and accepted by learned counsel on either side:

(1) Was the defendant Nishi Kanta Pal responsible for the shortage of the sum of Rs. 8,800/- belonging to the Comilla Banking Corporation Ltd. while working as its cashier as alleged in paragraph 6 of the Bank's written statement?

(2) Is the defendant bank entitled to claim the sum of Rs. 8,800/- from the second defendant Nishi Kanta Pal? If so, is it entitled to adjust the same from the proceeds of

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the securities deposited with the Comilla Banking Corporation Ltd. as well as from the outstanding balance from the provident fund of the second defendant Nishi Kanta Pal?

(3) Did the plaintiff have any knowledge in July 1947 of the aforesaid shortage?

(4) Did the second defendant Nishi Kanta Pal fail to pay the said sum of Rs. 8,800/- or any portion thereof to the Comilla Banking Corporation?

(5) To what reliefs, if any, is the plaintiff entitled?

The evidence in this case has been both oral and documentary. There is an admitted brief of documents marked Ex. B. There is also an admitted brief of correspondence marked Ex. A. The plaintiff himself gave evidence and was the only witness on his side. On behalf of the defendant bank three witnesses were examined. One is Saroj Bihari Nandy, at present an agent of the Bogra branch of the United Bank of India in East Pakistan, and at the relevant time a Deputy Agent at the Narainganj Branch of the Comilla Banking Corporation. The other is Birendra Mohan Mitra, now an officer of the Advance Department at the Head Office of the bank and at the relevant time he was in the Calcutta Office of the Comilla Banking Corporation. The third witness on behalf of the bank is Manindra Bhusan Dutt, at present Superintendent of Accounts at the Head Office of the United Bank of India and at the relevant time the Chief Accountant of the Comilla Banking Corporation.

Besides this evidence there are certain admitted facts which the parties and counsel appearing on either side have admitted and are recorded as hereunder:—

1. Shortage of Rs. 600/- on the 15th August 1946 due to the default of defendant Nishi Kanta Pal.

2. Shortage of Rs. 400/- on the 25th November 1946 due to the default of defendant Nishi Kanta Pal.

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5. Shortage of Rs. 8,200/- on the 28th November 1946 due to the default of defendant Nishi Kanta Pal.

6. Formal discharge of defendant Nishi Kanta Pal not made until the 4th December, 1946.

7. The fact that there was a departmental enquiry by the bank.

8. Formal discharge by the bank of defendant Nishi Kanta Pal.

7. That the plaintiff had knowledge in July 1947 of the aforesaid shortages from the defendant bank's letter dated the 16th July 1947

8. The two Government Promissory Notes mentioned in the plaint were assigned to the defendant bank by Rajani Kanta Pal.

9. The sale of Government Promissory Notes No. CA 077157 (formerly numbered 390435) by the defendant bank on the 19th November 1947 producing the total proceeds of Rs. 5,037-4-0.

10. The proceeds of the surrender value of the insurance policy of defendant Nishi Kanta Pal amounting to Rs. 306/- in 1948.

11. The outstanding balance of the provident fund of defendant Nishi Kanta Pal is Rs. 294-14-3.

These facts are admitted in writing signed by counsel on either side.

So far as the non-appearing defendant Nishi Kanta Pal is concerned the case against him has been proved by the bank's witnesses I have mentioned. That was necessary because the admission could not cover the non-appearing defendant.

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On the first issue, therefore, I hold upon admission of the plaintiff, that the defendant Nishi Kanta Pal was responsible for the shortage of the sum of Rs. 8,800/- belonging to the Comilla Banking Corporation while working as its cashier as alleged in paragraph 6 of the written statement of the defendant bank. As against defendant Nishi Kanta Pal himself I hold and find on the evidence of the bank's witnesses, Saroj Behari Nandy, Birendra Mohan Mitra and Manindra Bhusan Dutt, which has not been disputed by defendant Nishi Kanta Pal by his appearing before me and cross-examining such evidence, that defendant Nishi Kanta Pal is responsible for the shortage of the sum of Rs. 8,800/-. I therefore answer issue No. 1 in the affirmative.

ISSUE No. 2:

The first part of this issue raises the question whether the defendant bank is entitled to claim the sum of Rs. 8,800/- from the second defendant Nishi Kanta Pal. As I have already found and held that the bank has proved its case in the written statement by the evidence of its three witnesses, which has not been contradicted by the defendant Nishi Kanta Pal, this part of the issue must, therefore, be answered in the affirmative. Nothing appears from the cross-examination of the bank's witnesses by the plaintiff's counsel to controvert that finding. I therefore hold that the defendant bank is entitled to claim the sum of Rs. 8,800/- from defendant Nishi Kanta Pal and answer this part of issue No. 2 in the affirmative.

The second part of this issue is the controversial part and I will discuss it later in this judgment. It is this part of the second issue which raises the question whether the defendant bank is entitled to adjust the sum of Rs. 8,800/- against the securities now claimed by the plaintiff.

ISSUE No. 3:

On the plaintiff's evidence and having regard to the admissions of fact already recorded I hold and find that the plaintiff did have knowledge of the aforesaid shortage in July 1947 and therefore answer issue No. 3 in the affirmative.

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This issue also can be disposed of briefly. The evidence of the bank's witness Manindra Bhusan Dutt establishes the fact that the surrender value of the insurance policy of defendant Nishi Kanta Pal was Rs. 306/- and the further fact that the outstanding balance on the provident fund account of defendant Nishi Kanta Pal is Rs. 294-14-3. This evidence is uncontradicted so far as the non-appearing defendant Nishi Kanta Pal is concerned and must therefore be accepted as against him. As against the plaintiff these two amounts being the proceeds of the surrender value of the insurance policy and of the provident fund account are admitted by him. Therefore, although defendant Nishi Kanta Pal did not himself pay any part of the shortage of Rs. 8,800/- to the Comilla Banking Corporation, credit on his account must be given for the sum of Rs. 600-14-3, being the total of the two sums of Rs. 306/- and Rs. 294-14-3 and the Bank is entitled to appropriate the same. Deducting this sum of Rs. 600-14-3 from Rs. 8,800/- I find a sum of Rs. 8,199-1-9 which the defendant Nishi Kanta Pal has failed to pay towards the shortage of Rs. 8,800/-. On issue No. 4, therefore, I hold accordingly.

SECOND PART OF ISSUE NO. 2:

I will state this part of the issue once again before I proceed to discuss it. It raises the question: Is the defendant bank entitled to adjust the sum of Rs. 8,800/- from the proceeds of the securities deposited with the Comilla Banking Corporation Ltd. as well as from the outstanding balance from the provident fund of the defendant Nishi Kanta Pal? On the part of this issue which relates to the provident fund of the defendant Nishi Kanta Pal I have already recorded my finding on issue No. 4 which covers it.

The real controversy in this suit is raised over this part of issue No. 2 because it concerns the basic claim of the plaintiff. The plaintiff claims return of the securities and the bank resists such claim because it wants such securities to recoup the shortage of Rs. 8,199-1-9.

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The main argument on this major controversy rests on certain facts which it will be convenient to recapitulate here. This recapitulation is necessary because Mr. Das has raised certain points of law which require appreciation of these facts. Now the guarantor Rajani died on the 18th April 1945. Defendant Nishi Kanta's first default was in respect of Rs. 600/- on the 15th August 1946. His second default in respect of Rs. 400/- was on the 25th November 1946. His third default was in respect of Rs. 8,200/- on the 28th November, 1946. He was relieved of his charge on the 29th November, 1946 as will appear from Nandi's evidence contained in answers to questions 52 to 53. The Bank carried out an investigation and departmental enquiry immediately thereafter and formally discharged him from the 4th December 1946. The ground of discharge was that Nishi Kanta failed to make good the shortage of the two sums of Rs. 6,200/- and Rs. 600/- amounting altogether to Rs. 8,800/-. It is necessary to mention here that Nishi Kanta made good the second shortage of Rs. 400/- of the 25th November 1946 either on the same day or the day after. The investigation report shows that he made good the sum of Rs. 400/- on the same day and the evidence of Nandi shows that it was either on the same day or the day after.

On these facts Mr. Das for the plaintiff raises his points of law. His argument is that after the first default in respect of Rs. 600/- on the 15th August 1946 there was no notice to the plaintiff and the continued employment without notice to the plaintiff, of Nishi Kanta by the Bank in spite of this default, discharged the plaintiff from his obligations under the Security Bond. This argument is repeated in respect of the default of Rs. 400/- by contending that the continued employment of Nishi Kanta by the Bank even after this default without notice to the plaintiff discharged him from his obligations under the Security Bond. Therefore it is contended that the plaintiff is no longer liable to answer the Bank's loss due to the default of Nishi Kanta for the sum of Rs. 8,800/- and that the Bank is not justified in reimbursing its loss from the Government Promissory Notes deposited as security with the Bank under the Security Bond. In aid of this argument Mr. Das has relied on a decision of the Lahore High Court reported in *Cooperative Commission Shop Ltd. Chak Jhumra through Chaudhuri Ghulam Haider*,

President of Shop v. Udham Singh & sons (1), and on Section 139 of the Indian Contract Act. The Lahore decision of Harries C.J. and Mahajan J. lays down the well known principle that continued employment of a dishonest servant whose dishonesty has been proved or is clear, without notice to the guarantor will discharge the guarantor. Section 139 of the Contract Act says that if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged. According to Mr. Das the continued employment of a dishonest servant without notice to the guarantor is inconsistent with the rights of the surety because the surety is thereby required to take a hazard which it may not have been his intention to take under the original guarantee had he known or if it was brought to his notice that the man whose faithful service he was guaranteeing has since been proved to be dishonest.

On a careful consideration of this argument I find that neither the facts nor the law justifies it in the present case.

A surety's liability for the faithful discharge by another of his duties depends in each case on the exact terms of that guarantee. The exact terms of a particular of guarantee are the primary determinants of the scope and liability of the guarantor in each individual case. That is the central fact which must dominate the decision in a particular case whether the surety is liable or not. The surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised because the employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work. This proposition is supported by the well known authority of the *Mayor of Kingston-upon-Hull v. Harding* (2). The reason why I state this proposition is because of the contention made on behalf of the plaintiff that the Bank could have protected itself by more diligence, although I must confess that on

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(1) (1944) A.I.R. Lah. 424.

(2), (1892) 2 Q.B. 494.

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the facts nothing has been shown to me which goes to show that the Bank was in any way negligent in exercising its powers of superintendence over the duties performed by Nishi Kanta. I find that far from being negligent the Bank was very diligent and quick indeed to check Nishi Kanta's negligence of duties.

I accept without hesitation the proposition of Mr. Das for the plaintiff that if the employer of a servant whose fidelity has been guaranteed continues to employ him even after a proved act of dishonesty without notice to the guarantor the surety is discharged. (That is a basic principle implicit in the very nature of a fidelity guarantee. The reason why it is so can be stated briefly. The guarantor in such a case guarantees the fidelity and not the infidelity of the servant. He guarantees the fidelity and ensures the loss against the risk of infidelity and not the fact of infidelity.) To begin with, the guarantee for fidelity means that the guarantor says in fact that he knows the fidelity of this man and he will insure the risk of any loss if such a servant commits an act of infidelity. If the employer wants to continue a dishonest servant after his dishonesty has been proved then he must give the guarantor notice of the act of infidelity so that the guarantor may get an opportunity to say whether he would continue his guarantee or not for a man whose infidelity has been proved. If he does then the employer can certainly hold the guarantor liable for the subsequent act of infidelity. But if the guarantor is not given this opportunity by the employer then the guarantor cannot be held to his original guarantee because to do so will be to permit the employer to encourage dishonesty at the cost of the guarantor which will not only be against all known notions of fairness but also be most repugnant to the elementary consideration of public policy. It is unnecessary for me to discuss in detail the numerous authorities which have settled the law that a surety will be discharged if the employer of a servant whose fidelity has been guaranteed continues to employ him had after a proved act of dishonesty without notice to the guarantor. I will only mention the very well known decision of *Phillips v. Foxall* (1), in support of that proposition.

The plaintiff's stand on Section 199 of the Indian Contract

(1) (1872) L.R. 7 Q.B. 666.

Act cannot be maintained. In order to attract that Section there must not only be either an act inconsistent with the rights of the surety or an omission to do an act which it is the creditor's or employer's duty to do but also the impairment of the eventual remedy of the surety against the principal debtors. This impairment of the surety's eventual remedy against the principal debtor is the very crucial factor in this section of the Statute. The concluding words the Section uses are significant: "And the eventual remedy of the surety himself against the principal debtor, is thereby impaired." These are the qualifying words which qualify the act or omission mentioned in this Section. The true construction of the Section 139 of the Indian Contract Act in my opinion is that the act or omission must be such as to impair the surety's eventual remedy against the principal debtor before the surety can be held to be discharged. If it does not then the surety is not discharged under Section 139 of the Indian Contract Act.

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On this point it is necessary to emphasise that the law in India is not the same as the English Law and therefore appeal to the English cases and authorities is likely to be misleading. The Court of Appeal in *M. Pogose v. The Bank of Bengal* (1), is a useful authority on this point. The observations of Chief Justice Gerth at pp. 1678 of that Report being material, I quote "The execution of the trust deeds by the Banks, having regard to its effect upon the plaintiff's remedies against Mr. N. R. Pogose was an act inconsistent with the rights of the surety, which by the law of England would have discharged him; see *Calvert v. London Dock Company* (2). *The General Steam Navigation Co. v. Rolt* (3), and other cases to the same effect in the notes to *Bess v. Berrington* (4). But under this Section (Section 139 of the Indian Contract Act) before the act of the creditor can operate as a discharge, it is necessary to look further and say whether by that act the eventual remedy of the surety against the principal is impaired." The observations of Lord Porter in *Mahant Singh v. U. Ba. Yi* (5), give the same emphasis where his Lordship says "Section 139 only applies where the eventual remedy of the surety against the principal debtor is

(1) (1877) I.L.R. 3 Cal. 474; (2) (1871) Keen's Rep. 1638; (3) (1871) 6 C.B.N.S. 550; (4) (1929) 42 Wh. & T.L.C. 1106; (5) (1939) L.R. 66 I.A. 198 at p. 208.

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impaired, and, for reasons they have given, their Lordships find nothing in the present case which impairs the respondent's remedy against the original trustees."

It is here that the plaintiff's whole case fails. There is nothing in evidence before me to show that the plaintiff's eventual remedy against the principal debtor Nishi Kanta has in any way been impaired. But apart from that total absence of evidence on this point which is always a question of fact, the plaintiff in his this very action sues and is suing the defendant Nishi Kanta Pal. Therefore the plaintiff's own act of suing the principal debtor in this suit itself goes against the plaintiff's contention that his eventual remedy against the principal debtor is impaired. Indeed the plaintiff is getting his decree against the principal debtor who has not even appeared in this suit to defend himself. I am satisfied that in an action where the surety himself sues the principal debtor thereby proving that his eventual remedy against him is not impaired, he cannot be heard to say that he has been discharged on the ground that his eventual remedy against the principal debtor is impaired.

That is the end of the plaintiff's case so far as the defendant Bank is concerned. It is therefore not necessary for me to discuss in detail the facts on which Mr. Das relies and which I recapitulated at the beginning of my discussion of the point. Nevertheless I will briefly notice these facts out of deference to the arguments of Mr. Das for the plaintiff.

The default in respect of Rs. 600/- was committed by Nishi Kanta on the 15th August 1946. The letter of the Bank Accountant dated the 3rd September 1946 from Narayangunge to the Manager at the Head Office at Comilla shows that Nishi Kanta was given opportunity to make good this shortage of Rs. 600/- but he being unwilling to do so the suggestion was made that the security deposit on his account should be adjusted, not only in accordance with the Head Office Instructions but also under Rules 1 and 9 of the Bank's Rules which are exhibited in this suit. In fact within 4 or 5 days after the incident the Chief Accountant of the Bank writes to the Agent at Narayangunge on the 20th August 1946 drawing the attention to the shortage of Rs. 600/- saying that the Cashier should be

asked to replenish the shortage immediately and failing, which the shortage is to be adjusted at once by debiting his service security account with the Head Office. The second default in respect of Rs. 400/- was committed on the 25th November 1946. Immediately on the 26th November, 1946, the Deputy Agent's letter to the Manager of the Head Office at Comilla draws attention to this fact. It is true that he says there that it is wise to put another Cashier in charge of the Cash instead of Nishi Kanta and suggesting that Nishi Kanta should be transferred to the Bill and Securities Department. The letter ends by saying "If the amount in question is not realised from him by to-morrow, the sum will be adjusted by debiting his security deposit account to the Head Office." Although the Bank thought at that time that it was wise to transfer Nishi Kanta and not to continue him in charge of the cash because of this default of Rs. 400/-, the prompt act of Nishi Kanta by making good this shortage by paying the sum of Rs. 400/- at least goes to indicate that his dishonesty in respect of this sum is not clearly proved. Within a day after such payment Nishi Kanta committed the default in respect of Rs. 8,200/- on the 20th November, 1946. Now these facts clearly distinguish the Lahore decision on which Mr. Das relied. There it was a case of continuous and repeated defaults over three consecutive years 1930, 1931 and 1932 with the Auditors reporting these "gross breaches of duty" year after year. In the present case before me the whole thing happened in a period of about three months between the 15th August 1946 and the 28th November 1946, with an incident in between in respect of Rs. 400/- on the 25th November 1946 which was in fact made good by Nishi Kanta. In this context I am not prepared to accept that the acts of dishonesty of the servant were so clearly established that his employment for these three months comes within the principle of the employer continuing to employ the servant after proved acts of dishonesty without notice to the surety so as to discharge the surety.

The terms of the guarantee at this point may be usefully referred to. The main term of the guarantee stipulates for the liability of the guarantor for "any dereliction of duty of the said Nishi Kanta Pal or if the Bank suffers any loss or damage on account of the negligence or carelessness or embezzlement or if he is found guilty by the Directors." The guarantor's liability

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therefore does not arise unless (a) there is dereliction of duty (b) or carelessness or negligence or embezzlement or (c) finding of guilt of Nishi Kanta by the Directors. These are questions of facts on which the Bank has to be satisfied and sometime must be allowed to the employer Bank to be satisfied about these serious questions of fact of carelessness or negligence or embezzlement or dereliction of duty or finding of guilt. One other material term is "I Rajani Kanta Pal further covenant that this Bond shall commence to have effect from the 24th April 1939 and shall continue in force until the said Nishi Kanta Pal will have received a formal discharge of all liability from the Comilla Banking Corporation Ltd. and its successors and assigns and shall have received this Bond from the Bank." Now the formal discharge came on the 4th December 1946 and by the expressed terms of this clause until this formal discharge the Bond continues to have effect. After all a Bank cannot dismiss its employee merely on suspicion or merely because some shortage in the cash of which he was in charge is reported without investigation. It has to wait for investigation and it has to find out for itself what the actual fact is. It cannot act on mere suspicion or unverified reports or without giving an opportunity to its servant to be heard in his favour. The continued employment of a servant without notice to surety in order to discharge the surety must be after the creditor or employer has proof of the servant's acts of dishonesty and not merely suspicions or reports about them. The theory is a theory not of suspicion but of satisfaction. A contract of guarantee unlike a contract of insurance is not one of uberrime fidei but a contract strictissima Juris. (16, Halsbury, Hailsham Edition page 59; Article 52). By its letter of the 4th December 1946 the Bank intimated to Nishi Kanta Pal "As a result of the investigation of the shortage of Rs. 8,200/- only in the closing cash balance of the 28th November 1946 you had been held responsible for the said shortage. You are therefore requested to make good the above shortage along with the shortage of Rs. 600/- made by you previously on the 15th August 1946. * * * * *

If you fail to do so within Friday next, the amount will be adjusted from your security deposit account without further reference to you." Upon his failure to do so the Bank intimated to him again on the 9th December 1946 that the whole of this amount will be realised from the sale proceeds of your security

d lodged with the Bank (Government Promissory Notes for Rs. 10,000/-) and from your Provident Fund, outstanding pay, if any, and the amount due on your Life Policy.

It is unnecessary for me to pursue these facts any further for the simple reason that under the law under Section 139 of the Indian Contract Act the plaintiff's action must fail on the ground that his eventual remedy against defendant Nishi Kanta has not in any way been impaired. I will only record one more fact here that defendant Nishi Kanta Pal is helping the plaintiff with documents for which the plaintiff's contradictory evidence in answers to Q. 62 and Q. 99 can be compared and according to plaintiff's answer to questions 97-103 he is in close touch with Nishi Kanta or his mother.

For these reasons I therefore answer this part of the second issue in the affirmative and I hold that the defendant Bank is entitled to adjust the sum of Rs. 8,800/- from the proceeds of the securities deposited with the Comilla Banking Corporation Ltd. as well as from the outstanding balance of the Provident Fund of the second defendant Nishi Kanta Pal.

Issue No. 5:

This issue concerns the reliefs to which the plaintiff is entitled in this suit.

As against the defendant Nishi Kanta Pal on the evidence and facts as proved before me the plaintiff must have judgment for the sum of Rs. 8,199-1-9 (after giving credit for the proceeds of the Provident Fund account and Insurance Policy of the defendant Nishi Kanta Pal) with interest and costs. The plaintiff is entitled to both interim interest and interest on judgment on this sum as against the defendant Nishi Kanta Pal which I allow at six per cent per cent per annum.

As against the defendant Bank the plaintiff's action must fail on the grounds I have already stated and on the basis of my findings on the above issues which I have recorded. Now the fact is that one Government Promissory Note, a part of the total security under the Security Bond, being No. CA077157 (formerly numbered 390435) has already been sold by the de-

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defendant Bank on the 19th November 1947, producing an yield of Rs. 5,037-4-0. I hold that the defendant Bank was justified in selling this Promissory Note and it should be allowed to appropriate the proceeds thereof towards its claim for Rs. 8,199-1-9. The balance of Rs. 3,161-13-9 being the difference between Rs. 8,199-1-9 and Rs. 5,037-4-0, the Bank is entitled to recoup from the other remaining Government Promissory Note. The Bank has not succeeded in converting this other Government Promissory Note because of the defect of the endorsement thereon. This Government Promissory Note was endorsed in favour of the Comilla Banking Corporation Ltd. but in the renewal cage in the palce of the holder's name Rajani signed his own name though the Comilla Banking Corporation Ltd. was the holder. Attempt to convert it through the Reserve Bank has not yet succeeded. In fact this Promissory Note was sent to Rajani for rectification of the endorsement but unfortunately there again instead of making the correct endorsement, Ranaji committed a fresh mistake by signing over again, after cancelling his first signature, inside that cage instead of in the margin where there is an indication to put the signature. After Rajani's death the rectification was no longer possible. The Bank also tried thereafter to cash it through the Public Debt Office but the Bank has been required to produce a Succession Certificate by the heirs of the deceased and a confirmation by them of the endorsement made by Rajani. In this connection reference to the letters of the 12th August, the 20th August and the 21st August 1946 was made to show that neither defendant Nishi Kanta nor the plaintiff supplied the Succession Certificate to the Bank. All this evidence is to be found in the deposition of Manindra Bhushan Dutt, the Chief Accountant of the Comilla Banking Corporation Ltd. in answers to questions 18 to 36. The result therefore is the Bank is holding this Promissory Note but has not been able to cash it yet. According to my findings the Bank is entitled to hold the same for the purpose of ultimately realising the balance of its dues from the proceeds thereof. No evidence has been given before me to prove that the plaintiff is entitled to any interest on these Government Promissory Notes and there is no evidence before me as to what interest the Bank had drawn on these Notes. In any event, there is no evidence before me to show that the Bank did not pay any interest on these Government Promissory Notes to Rajani which he re-

served under the Security Bond and which was payable to Rajani. In fact the Bank's suggestion to the plaintiff was clear that the books of account it disclosed showed payment of all interest to Rajani up to July 1945 in respect of the first Government Promissory Note. The plaintiff has not produced his books of account and he has admitted he cannot be definite or certain about his father Rajani's drawings of interest. This evidence will be found in plaintiff's answers to questions 90-92. Plaintiff's claim therefore for the recovery of these Government Promissory Notes and for interest thereon as against the defendant Bank must fail. I therefore dismiss the plaintiff's suit as against the defendant Bank with costs.

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I, therefore, answer Issue No. 5 accordingly by decreeing the plaintiff's claim against defendant Nishi Kanta Pal for Rs. 8,199-1-9 with costs and by dismissing the plaintiff's suit as against the defendant Bank with costs.

If the sale proceeds of the second Government Promissory Note yield more than Rs. 3,151-13-9 and the costs awarded hereby to the defendant Bank, then the Bank will hand over such surplus to the plaintiff. Certified for two Counsel.

N. C. Seal: Solicitor for the Plaintiff.

S. N. Sen: Solicitor for the Defendant Bank.

*Suit dismissed against Defendant No. 1,
the employer Bank, and decreed against
Defendant No. 2, the Principal Debtor.*

(P.K.D.)

CIVIL REVISION.

Before Mr. Justice Lahiri and Mr. Justice Mitter.

Civil.

CONTINENTAL DRUG COMPANY LTD.

1954.

May, 20.

CHEMOIDS & INDUSTRIES LTD.*

Agreement that the Suit should be instituted in one of two competent courts—Whether an arbitration clause, within the meaning of Section 34 of the Indian Arbitration Act—Whether hit by Section 28 of the Indian Contract Act—The Principle that parties cannot by consent confer or take away the Jurisdiction of a court, where applicable.

The agreement relied upon by the plaintiffs as the foundation of their claim contains a clause that "any dispute arising between the parties, settlement of the same, legally or otherwise, will be decided in Bombay." The defendants raised a preliminary point that under the aforesaid clause of the agreement the subordinate Judge of 24-Parganas had no jurisdiction to entertain the suit and that it was only the Bombay Court which was competent to entertain the Suit. The Subordinate Judge of 24-Parganas held that the agreement in question amounted to an arbitration clause and that, as there was no proper application under section 34 of the Indian Arbitration Act by the defendants, no effect could be given to the aforesaid clause in the agreement.

Held—that the question is whether the agreement by which the Bombay Court was chosen as the forum for the disposal of disputes between the parties is void under section 28 of the Indian Contract Act. Section 28 applies to a case where there is an absolute restriction upon the parties from enforcing their rights in the ordinary tribunals. If there are two courts which are equally competent to try the suit, an agreement between the parties that the suit should be instituted in one of those two courts is not an absolute restriction on the right of taking legal proceedings in ordinary tribunals but a partial restriction on such right. Such an agreement does not contravene the provisions of section 28. Section 28 does not vitiate an agreement by which a party who has the choice of the forum agrees to a limitation of that choice or agrees to the curtailment of the unlimited choice conferred upon him by law. An agreement of this character does not amount to an arbitration clause. Therefore the fact that steps have been taken in the suit by the Defendants is no bar to the granting of relief on the basis of the agreement. The proper procedure by which effect can be given to the agreement is by returning the plaint for presentation to the proper Court.

* Civil Revision Case No. 1132 of 1954 against an order of the Subordinate Judge, 7th Court Alipore, dated the 19th February, 1954.

Held further—that the principle that parties cannot, by consent confer or take away the jurisdiction of a Court applies only to cases of inherent jurisdiction of a court but an objection as regards the territorial jurisdiction of a court can be waived by a party.

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Application for Revision under section 115, Civil Procedure Code.

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Suit for declaration that under an agreement the plaintiffs were the sole distributors of the defendants and for accounts and for recovery of certain sums of money as compensation and damages.

Lahiri, J.
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The material facts will appear from the judgment.

Amiya Kumar Mukherjee for the Petitioners:

Manindra Nath Ghosh for the Opposite Parties.

The Judgement of the Court was as follows:—

Lahiri, J.:—This rule has been obtained by the defendants against an order made by the Subordinate Judge, 7th Court, 24-Parganas in Title Suit No. 83 of 1953, by which the learned Subordinate Judge has decided the question as to whether he was competent to try the suit. The plaintiffs opposite parties instituted the suit for a declaration that under an agreement dated December, 23, 1950, the plaintiffs were the sole distributors of the defendants and also for a decree for accounts against the defendants and for recovery of certain sums of money as commission and damages. The agreement which was relied upon by the plaintiffs as the foundation of their claim contains a clause which runs as follows: "Any dispute arising between the parties, settlement of same, legally or otherwise, will be decided in Bombay." The defendants raised a preliminary point to the effect that under the aforesaid clause of the agreement, it was only the Bombay court which would be competent to try the suit. The learned Subordinate Judge has held in substance that the agreement in question amounts to an arbitration clause and as there was no proper application under section 34 of the Indian Arbitration Act by the defendants he was not prepared to give effect to that clause and, therefore, overruled the plea

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raised by the defendants. Against this decision the defendants have obtained the present Rule.

Mr. Mukherjea, appearing in support of the Rule has placed before us decisions of different High Courts of India in which the effect of an agreement like this has been considered and Mr. Ghose, appearing on behalf of the opposite parties, has also invited our attention to certain other decisions which according to him support his view. It is a well-settled proposition of law that litigants cannot, by private agreement, confer jurisdiction upon a court which it does not possess nor can they divest a court of jurisdiction which it possesses under the ordinary law. In the case before us, it is conceded that both the Bombay Court and the Alipore Court have concurrent jurisdiction to try the suit. The question is whether the agreement by which the Bombay Court was chosen as the forum for the disposal of all disputes between the parties can be said to be void under section 28 of the Indian Contract Act. That section runs as follows: "Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void to that extent." There are two exceptions to this section which save agreements for reference to arbitration. On a plain reading of this section, it seems to us that it applies to a case where the parties are wholly precluded from pursuing their legal remedies in the ordinary tribunals because in that case it can be said that there is an absolute restriction upon the parties from enforcing their rights in the ordinary tribunals. If, however, there are two courts which are equally competent to try the suit, an agreement between the parties that the suit should be instituted in one of those two courts cannot, in our opinion, be said to be an absolute restriction on the right of taking legal proceedings in the ordinary tribunals but a partial restriction on such right. It has been established by a long line of judicial decisions that such an agreement does not contravene the provisions of section 28 of the Indian Contract Act if the chosen court has jurisdiction to try the suit under the ordinary law. Vide in this connection the decisions of the Madras High Court in the case of *Achutlal Kesarilal Mehta and Co. v. Vijayam and Co.* (1), which was

(1) (1925) A.I.R. Mad. 1145.

followed by the same High Court in the case of *Kondepu Raghavayya v. Elukkoru Vasude-Vayya Chetty* (1). The same view was also taken by the Bombay High Court in the case of *Tilakram Choudhuri v. Kodumal Jethanand Wadha* (2). In our own Court Lord Williams, J. approved of the decision in *Acharatlal's Case* (3), in the decision reported in *A. Milton & Co. v. Ojha Automobile Engineering Co.* (4). In this case there was an agreement which ran as follows:—"Any litigation arising out of this agreement shall be settled in the High Court of Judicature at Calcutta or in the Small Causes Court, Calcutta, and in no other court whatsoever." The defendants brought a suit in Agra whereas the plaintiffs brought a suit in Calcutta. Lord Williams, J. held that under the agreement between the parties it was not open to the defendants to proceed with their suit in Agra and restrained the defendants by a temporary injunction from proceeding with their Agra suit. In the Lahore High Court there was divergence of judicial opinion on this point. In the case of *Kidri Prosad v. K. R. Khosala* (5), Shadi Lal, C.J. held that an agreement of this description took away the jurisdiction of the court under the ordinary law and was therefore void and he made the following observation:—

"As regards the plea of want of jurisdiction it is clear that litigants cannot, by agreement interse, divest a court of its inherent jurisdiction over the subject matter of a suit no more than they can confer jurisdiction on it by consent where it has none." This view was also taken in the case of *Jagan Nath Amar Nath v. Burma Oil Co., Ltd.* (6). These earlier decisions of the Lahore High Court however were overruled by a Full Bench of the same High Court in the case of *Musa Ji Lukman Ji v. Durga Dass* (7). In this decision Mahajan, J. in delivering the judgment of the Full Bench observed as follows with regard to the effect of section 28 of the Indian Contract Act. "The section makes void only those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. But this section has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a

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| (1) (1944) A.I.R. Mad. 47. | (4) (1930) 57 I.L.R. Calc. 1280 |
| (2) (1928) A.I.R. Bom. 175. | (5) (1923) A.I.R. Lah. 425. |
| (3) (1925) A.I.R. Mad. 1145. | (6) (1929) A.I.R. Lah. 605. |
| (7) (1946) A.I.R. Lah. 57. | |

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selection of one of those ordinary tribunals in which ordinarily a suit would be tried. This section, in my view prevents parties from divesting courts of their inherent jurisdiction, but it does not, in any way, vitiate an agreement between the parties by which a person who has the choice of the forum agrees to a limitation of that choice or agrees to the curtailment of the unlimited choice which law has conferred upon him." His Lordship further observed that the principle that parties cannot by consent confer or take away the jurisdiction of a court applies only to cases of inherent jurisdiction of a court but an objection as regards the territorial jurisdiction of a court can be waived by a party. We respectfully agree with the view expressed in this decision and we hold that section 28 of the Indian Contract Act does not prevent the parties to a contract from selecting one of two competent courts for the disposal of their disputes.

We have now to notice some of the decisions of this court on the point. In the case of *Ramricklal Chhogganlal v. Vivekanand Mills* (1), Gentle J., sitting singly came to the conclusion that an agreement of the present description amounts to an agreement for reference to arbitration and therefore the Court has jurisdiction to take action under section 34 of the Arbitration Act. This decision was followed by the learned Subordinate Judge in the present case. With great respect we cannot agree with the view of Gentle J., that an agreement of the present description amounts to "submission to arbitration." The reason why we cannot agree with that view is this that if the decision of the chosen court be taken to be the decision of an arbitrator it will not have the force and effect of a decision by a competent court of law but will have the effect of an award given by an arbitrator under the provisions of the Indian Arbitration Act and the decision of the chosen Court will in that event be subject to all the exceptions that can be taken under the Indian Arbitration Act. The view of Gentle J. was dissented from by a Division Bench of the Bombay High Court in the case of *The Bharat Bank Ltd. v. Deepak General Insurance Co., Ltd.* (2), where Chagla C.J., and Gajendragadkar, J. observed as follows: "With very great respect, we are unable to accept the view of Mr. Justice Gentle as the correct view,

(1) (1944) 49 C.W.N. 58.

(2) A.O. No. 70 and A.C. No. 71 of 1950.

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There seems to be no reason, why only section 34 of the Arbitration Act should apply for the purpose of stay and the other provisions of the Arbitration Act should not apply to the suit which would be decided and disposed of by the chosen court." A court acts judicially and an arbitration acts as a domestic forum, deriving his jurisdiction and powers from the Arbitration Act, and it is never permissible to parties to constitute a Court of Law as an arbitrator under the Arbitration Act." We respectfully agree with these views expressed by Chagla C.J. with regard to the correctness of the decision of Gentle, J. The view taken by Gentle, J. has also been dissented from by Bachawat, J. in the case of *Motabhai Gulabdas and Co. v. Mahaluxmi Cotton Mills Ltd.* (1). In the case of *Dhanmal Marwari v. Messrs. Jankidas Baijnath* (2), Biswas and Latifur Rahaman, JJ. had to consider the effect of an agreement which ran as follows: "All payments and other transactions shall and should be deemed to have been effected at Katihar for determining the jurisdiction for any litigation even if the goods are supplied from any other place other than Katihar." The plaintiff then instituted the suit in the court at Chittagong. The learned Judge of the Court of first instance came to the conclusion that under the aforesaid clause of the agreement the Chittagong court had no jurisdiction to try the suit and returned the plaint for presentation to the proper Court. Biswas J. held that it might be conceded that where jurisdiction is vested in either of two courts, parties may be allowed by agreement to provide that all suits should be brought in one of such courts and not in the other. Such an agreement being only a partial restriction of the rights of the parties under the ordinary law may not be hit by section 28 of the Indian Contract Act. But he further observed that it was not necessary for him in that case to express any opinion upon that point. Latifur Rahman, J. on the other hand expressly held that such an agreement would not contravene the provisions of section 28 of the Indian Contract Act because the plaintiff was not thereby restricted absolutely from enforcing his rights under or respect of the contract by the usual legal proceedings in the ordinary tribunals and the restriction was only partial. In that case, however, it was held by both the learned Judges that the Katihar court had no pecuniary jurisdiction to try the suit which had been insti-

(1) (1952) 91 C.L.J. 1.

(2) (1944) 49 C.W.N. 123.

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tuted by the plaintiff in the Chittagong court and in that view of the matter it was held that the Chittagong court was only competent to proceed with the hearing of the suit. In the case of *Chittaranjan Guha v. Parul Rani Nandi* (1), Henderson, J. sitting singly came to the conclusion that the effect of an agreement like the present one was to prevent the plaintiff absolutely from instituting a suit in a particular court and as such it would come within the mischief of section 28 of the Indian Contract Act, but in the case before him he held that even if the agreement was not void it would not deprive the court in which the suit had been instituted of its jurisdiction to try it. If the decision of Henderson, J. is interpreted to mean that section 28 of the Indian Contract Act applies to a contract by which the parties select one of two competent courts for the disposal of their disputes, we must respectfully dissent from it because we have already pointed out that such a contract does not amount to an absolute but only to a partial restriction of the right to enforce the rights by the usual legal proceedings in the ordinary tribunals; but in our opinion the decision of Henderson, J. does not go so far as to hold that an agreement of this description is void under section 28 of the Indian Contract Act.

As a result of the following discussion we have come to the conclusion that the agreement which is embodied in clause 15 in the present case and we have been quoted in an earlier part of the judgment is not void and is binding between the parties and is enforceable by a court of Law.

Mr. Ghose, appearing for the opposite party, has contended that even if the agreement is valid and binding it cannot be enforced in view of the fact that the defendants in the present case submitted to the jurisdiction of the Alipore Court by entering appearance and by applying for time to file written statement. If the agreement in the present case amounted to a submission to arbitration and if the provisions of the Indian Arbitration Act applied to the circumstances of the present case, this contention might be of some force because under section 34 of the Indian Arbitration Act the proceeding cannot be stayed if the party seeking to enforce the arbitration clause has taken any step in the proceeding. In the case before us, however, we have already pointed out that we do

(1) (1945) 50 C.W.N. 281.

not agree with the view taken by Gentle, J. that an agreement of the present description amounts to an arbitration clause.

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Mr. Ghose relied upon the decision of Bachawat, J. in the case of *Motabhai Gulabdas and Co.'s Case* (1), for the proposition that in that case Bachawat, J. refused to enforce the agreement on this ground but on going through the judgment we find that there is no substance in this contention. Bachawat, J. expressly said that the covenant was not an arbitration clause and the fact that steps had been taken in the suit was no bar to the grant of such relief but his Lordship did not give effect to the agreement because in that case the defendant denied the very existence of the contract and it was held by his Lordship that he could not allow the defendant to repudiate the contract and at the same time to enforce one part of it. In this view of the matter, we think that the decision in *Motabhai Gulabdas and Co.'s case* (1), is of no assistance to the opposite party.

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The next question is that if the agreement is not void and if it is binding between the parties, what is the procedure by which we can give effect to it. In the case of *Achrattal Kesavlal Mehta and Co.'s Cases* (2), the plaint was returned to the plaintiff for presentation to the proper court and this view was approved in the Full Bench decision of the Lahore High Court in the case of *Musa Ji Lukman Ji's Cases* (3). In view of the preponderance of Judicial opinion in favour of the view that in such cases the proper method of enforcing the agreement is to return the plaint for presentation to the proper court, we think that that should be the proper course for us to adopt in the present case as well.

We, therefore, make this Rule absolute and set aside the order made by the learned Subordinate Judge and direct that the plaint filed by the plaintiffs opposite parties be returned to them for presentation to the proper Court.

In the circumstances of this case there will be no order as to costs.

Mitter, J.:—I agree.

P.K.D.

Rule made absolute and plaint returned for presentation to the proper court.

(1) (1952) 91 C.L.J. 1. (2) (1925) A.I.R. Mad. 1145.

(3) (1946) A.I.R. Lah. 57.

CRIMINAL REVISION.

Before Mr. Justice Chunder.

CRIMINAL.

RAMPADA TARAFDAR.

1954.

THE STATE.*

June, 22.

West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1952, Sections 11, 12(b)—Indian Penal Code, Sections 21, Clause (10), and 409—Rule 3 framed under Bengal Village Self-Government Act.

Rule 3 framed under the Bengal Village Self-Government Act having laid down that the Union fund shall remain in the custody of the President of the Union Board and properties such as Books of account are to be kept by him, the President of a Union Board is a public servant within the meaning of Clause (10) of Section 21 of the Indian Penal Code. Therefore, if he be guilty of offence under Section 409 of the Indian Penal Code and a Criminal Proceeding against him commences for that offence in Court after the West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1952, has come into force, he is to be tried by the Special Court—A proceeding in court begins with the Submission of the charge-sheet. Police investigation is not a proceeding in Court.

Application for Revision at the instance of an accused on trial before a Special Court for offence under Section 409 of the Indian Penal Code.

The material facts will appear from the Judgment:—

Ajit Kumar Dutta and Arun Prokash Chatterjee for the Petitioners.

Jnanendra Nath Bakshi for the State/Opposite Party.

The Judgment of the Court was as follows:—

Chunder, J.:—This Rule was issued at the instance of one Rampada Tarafdar, an accused on trial before a Special Court at Alipore, presided over by Sri K. N. Bhattacharjee, Judge, charged with an offence under section 409 of the Indian Penal Code.

* Criminal Revision No. 376 of 1954 against an Order of Sri K. N. Bhattacharjee, Special Court, Alipur.

It appears that the Circle Officer during audit found out certain alleged irregularities and misappropriations and on his report the police held an enquiry and submitted a charge-sheet before the Subdivisional Magistrate of Barrackpore. The Court Inspector then filed an application that it was the case of a President of Union Board misappropriating Union Board funds and so was to be tried by the Special Court.

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The first contention raised by Mr. Dutta is that the case is premature and he draws attention to Rule 18 of the Account Rules made under the Bengal Village Self-Government Act, to be found at page 91, of the Union Board Manual, Volume 1 and to Note 2 therein to show that there is a procedure laid down for rectifying irregularities found etc., but this has nothing to do with any crime that may be committed which is under the general law. Therefore, as on police investigation *prima facie* the police was satisfied that a crime had been committed a charge sheet was properly submitted.

Mr. Dutta next draws my attention to Section 11 of the West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1952, which says that nothing in the Act shall apply to any proceeding pending in any court other than Special Court. According to him, as the accused was arrested and steps were taken by police before the Magistrate and also by the accused in connection with his bill, etc., so, according to him, it was proceeding pending in a court at the time when the West Bengal Amending Act of 1952 was enacted.

On the other hand, it appears that the charge sheet was submitted in October, 1952, long after the Act had come into force. The proceeding in court began with the submission of the charge sheet. A police investigation is not a proceeding in court.

Finally Mr. Dutta's contention is whether the petitioner President comes within Section 12 of the Amending Act of 1952. In section 12(b) the substituted clause runs as follows:—

“An offence punishable under section 409 of the Indian Penal Code, if committed by a public servant or

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by a person dealing with property belonging to Government as an agent of Government in respect of a property with which he is entrusted, or over which he has dominion in his capacity of a public servant or in the way of his business as such agent."

The first question agitated by Mr. Dutta is whether the President of a Union Board is a public servant. He can only be such if he comes within the clause 10 in section 21 of the Indian Penal Code. None of the other clauses would appear to apply to him. Clause 10 makes every officer, whose duty it is, as such officer, to take, receive, keep or expend any property, etc., a public servant. Under Rule 3 of the Rules made under the Village Self Government Act, dealing with the custody of Union Board Fund, made under the rule-making powers given by the Village Self Government Act, it has been laid down that "the Union Fund shall remain either in the custody of the President or Secretary, etc., so that he becomes a public servant because of the custody of the fund and also it appears because property, viz., books of account, etc., are to be kept by him. He, therefore, is a public servant." The offence charged is one under section 409 and it is alleged that he has committed this offence with regard to Union Board property as the President of the Union Board. If the accused is a public servant, then the offence must be committed in respect of property with which he is entrusted, or over which he has dominion in his capacity as a public servant to attract section 12(b). The requirement as to the property being that of the Government relates to the second part of the amended clause (2), given in section 12(b).

Therefore, in the present case, it had been rightly considered that this case came within the jurisdiction of the Special Court and therefore, the Magistrate rightly refused to exercise jurisdiction in it and a fresh charge sheet was submitted before the Special Court, namely, the Judge Sri K. N. Bhattacharjee. As up till now, all the steps have been legal, the Rule must be discharged.

P.K.D.

Rule discharged.

CIVIL REVISION.

Before Mr. Justice B. K. Guha.

RADHA RAMAN DE

v.

TARAK NATH SEN.*

CIVIL.

1954.

May, 12.

Revision—Civil Procedure Code, Section 115—whether all Co-sharer landlords are necessary parties in a suit for ejectment of tenant.

In a Suit for ejectment of a tenant on the ground of default in payment of rent instituted by the opposite party as sole landlord, the tenant in his written statement asserted that the Suit was bad for non-joinder of party as the opposite party's mother who was a co-sharer landlord had not been made a party in the Suit. The Courts below not having considered this aspect of the case which went to the root of the whole case, the case was sent back to the appellate court for disposal according to law.

Application for Revision under section 115 of Civil Procedure Code by the tenant.

Suit for Ejectment of tenant on the ground of default in payment of rent.

The material facts will appear from the judgment.

Bimān Chāndra Bose for the Petitioner.

Bejoy Bhose for the Opposite Party.

The judgment of the Court was as follows:—

B. K. Guha, J.:—This application under Section 115 of the Code of Civil Procedure by the tenant defendant is directed against an order passed by the Appellate Court under Section 14(5) of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950, in an ejectment suit brought by the opposite party against the present petitioner. The suit was instituted by the opposite party as sole landlord on the ground of default

* Civil Revision Case No. 2940 of 1953 against the decision dated 19-8-53 of the Judges, Special Bench of Small Causes, Calcutta, in ejectment Suit No. 561 of 1952 against an Order of the Judge, 3rd Court of Small Causes, Calcutta dated 15-12-52.

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for non-payment of rent since January 1951. Certain orders were passed by the trial Court in that suit. There was an appeal against the decision of the trial Court and in that appeal an application under Section 14(5) of the Act was filed by the Plaintiff respondent. The contention of the tenant defendant was that he had deposited rents regularly in the office of the Rent Controller and that there was no arrear. This contention was, however, overruled by the learned Judges of the Appellate Court with the observation that the deposit had been made not to the credit of the Plaintiff but to the credit of his mother. It appears to me that the learned Judges have not taken into consideration various circumstances which arose for decision before them. In the written statement of ejectment suit there was a specific denial by the defendant that he was holding the tenancy under the Plaintiff and it was also asserted by the defendant in the written statement that the suit was bad for non-joinder of parties as the Plaintiff's mother was the co-owner with the Plaintiff and so she was a necessary party to the suit. It was clear, therefore, that the defence was based *inter alia* upon the contention that the Plaintiff was not the sole landlord of the tenancy. The learned Judges have not, however, expressed any opinion regarding this aspect of the case which went to the root of the whole case and they have passed their order dated 19-8-53 over looking the real contention of the tenant defendant.

In these circumstances I am unable to uphold that order and the matter must go back to the Appellate Court for disposal of it according to law in the light of relevant considerations.

The Rule is made absolute accordingly. There will be no order as to costs.

P K.D.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice B. K. Guha.

HARI MOHAN GHOSH

CIVIL.

1954.

August, 26.

v.
ANNADA PROSAD GHOSH & ORS.*

Ancient documents as against record-of-rights and exparte rent decree followed by execution, the full benefit of which (exparte rent decree) has been accepted by plaintiffs—Areas in possession of respective parties as recorded in the record-of-rights not in proportion to the shares of the parties as recorded therein.

Plaintiffs-respondents' case was that they were owners of two-thirds share and Defendant-appellant was owner of only one-third share in a Jama of Rs. 5-10-11. The Defendant-appellant's case on the other hand was that he was owner of half share and the plaintiff-respondents were owners of the remaining half share in the said Jama. The plaintiff-respondents relied upon two ancient documents, one a patta of 1292 B.S. and the other a kabala of 1912 A.D.—The defendant-appellant relied upon the record of rights finally published in respect of the area in 1932 A.D. and an exparte kabala of 1912 A.D.—The defendant-appellant relied upon the record of which (exparte rent decree) had been accepted by the plaintiff-respondents.—The Defendant-appellant's explanation was that things had altered since the days of the two ancient documents.

Held—that, although an exparte rent decree may not amount to res judicata, yet it is a strong piece of evidence when it is followed by execution and when the plaintiffs have accepted its full benefit; that the presumption arising from the record-of-rights has not been rebutted by the ancient Patta and Kobala.

Held further—that undue weight ought not to be attached to the circumstances that the areas in the possession of the respective parties as recorded in the record-of-rights are not in proportion to the shares of the parties as recorded therein, for there may be various reasons why a co-sharer is not in possession according to his true share.

The Suit was a Suit for declaration of title and for recovery of excess amount of compensation money awarded by the Land

* Appeal from Appellate Decree against the decree of Sri B. M. Roy Choudhury, Additional District Judge of 3rd Court of Zillah 24-Parganas, in Title Appeal No. 958 of 1948, dated the 30th of November, 1949, affirming the decree of Sri J. C. Chakraverty, Munsif, and Court, Barasat, dated 29th of May, 1948.

CIVIL.

Acquisition Collector.

1954.

Hari Mohan

Ghosh

v.

Annada Prosad

Ghosh & Ors.

The material facts will appear from the judgment.

Prafulla Kamal Das for the Appellant.*Sib Kumar Das and Robin Mitter* for the Respondents.

B. K. Guha, J.

The judgment of the Court was as follows:—

August, 26.

B. K. Guha, J.:—This appeal by the defendant arises out of a suit instituted by the plaintiffs-Respondents for declaration of title, recovery of excess amount of compensation money awarded by the Land Acquisition Collector, 24-Parganas and for compensation. The subject matter of the suit are certain lands recorded in C. S. Khatian 395 of Mauza Baigachi and the substantial question in dispute between the parties is whether the entries in the record-of-rights regarding the extent of shares in the jama of Rs. 5-10 are correct. According to that Khatian, the Plaintiffs have 8 as. share in that jama, the remaining 8 as. being recorded in the name of the predecessor in interest of the Defendant. The case of the Plaintiffs is that the entry regarding shares is incorrect and that their share is $2/3$ rds, the remaining $1/3$ rd being the share of the Defendant. Accordance to the defence, however, the shares have been correctly recorded in the C. S. Khatian and in any case the claim of the Plaintiffs in the present suit is barred by the principle of estoppel. Both the Courts below have found in favour of the plaintiffs and decreed the suit accordingly. Hence the present appeal by the Defendant.

According to the case of the case of Plaintiffs, Kshantamani Dasi, maternal grandmother of the Plaintiffs held a jama of Re. 1/14/- under Murari Dhar Banerjee in village Baigachi where the suit lands are situated, the relevant patta (Ex. 2) being one granted as far back as 1292 B.S. and this jama was inherited by the Plaintiffs in 16 as. share. It is further the case of the Plaintiffs that one Khargeswar Ghose held a jama of Rs. 3-13/- under Murari Dhar Banerjee in the same village and this jama was purchased in 1912 A.D. by the Plaintiffs and the predecessor in interest of the Defendant in equal shares, the

relevant Kobala being Ex. 1. It has been found by the Pleader Commissioner appointed by the trial Court that the land of C.S. Khatian 395 are covered by the Kobala (Ex. 1) and the patta (Ex. 2) and his finding has been accepted by the Courts below. According to the Plaintiffs, the two *jamas* of Rs. 1/14/- and Rs. 3/12/- were recorded in the C. S. Khatian as one consolidated *jama* of Rs. 5/10/- and in that consolidated *jama* comprised of the *jama* inherited by the Plaintiffs from their maternal grandmother and half of the *jama* purchased by the Plaintiffs from Khargeswar Ghose, the share of the plaintiffs was two-thirds and not half as wrongly recorded in the C. S. Khatian. This case was accepted by the lower Courts. The defence suggestion is that the two *jamas* as evidenced by the patta (Ex. 2) and the Kobala (Ex. 1) came to an end sometime before the settlement operations and that one entire *jama* of Rs. 5/10/- was formed with the disputed lands. This suggestion did not, however, find favour with the lower appellate court, first, because there was said to be no evidence in support of it and secondly because the Plaintiffs have been possessing much more than 8 as. share of the lands of *jama* of Rs. 5/10/- as is clear from the finally published Record of Rights itself. In these circumstances, the presumption of the correctness of the Record of Rights in regard to the share of the respective parties in the *jama* of Rs. 5/10/- has been held by the Courts below to have been rebutted.

The view taken by the lower Courts would have been entitled to the greatest weight but for certain circumstances. So far as the relevant Record of Rights itself is concerned, it is not self-consistent in view of the discrepancy as between the shares of the parties and the area of the lands as recorded in their respective possession. The *pattah* of 1886 and the Kobala of 1912 were ancient documents, while the settlement operations came long after and very strong evidence would be necessary to show that things had altered since the days of the *pattah* and the kobala. There had been change in the personnel of the landlords: there had also been change in the holders of the tenancy, and these circumstances lend some weight to the suggestion on behalf of the Defendant to the effect that the *jamas* mentioned in the *pattah* and the kobala came to an end before the settlement operations. Then there is the recital in para 1 of the plaint of R.S. 842/40 instituted by the Plaintiffs against

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Ahladimani Dassi. In that plaint the share of Ahladimani was stated to be 8 as. in respect of a *jama* of Rs. 5/10/-. This plaint was followed by an *ex parte* decree which was put into execution. Plaintiff No. 1 sought to explain that the plaint was inadvertently drafted by the pleader's clerk without adhering to the advice of Plaintiff No. 1. This explanation is hardly credible: apparently it has been resorted to in order to do away with the effect of the *ex parte* decree. An *ex parte* rent decree may not amount to *res judicata*, but its evidentiary value is strengthened when it is followed by execution as in the present case. The plaintiffs have accepted the full benefit of that decree and if they attempt to turn round now and say that the recital about shares on the basis of which that decree was obtained was wrong, such attempt should be looked upon by the Court with disfavour. No useful purpose will be served by examining in detail the large number of cases which were cited at the Bar regarding the effect of an *ex parte* rent decree, as to whether it operates as *res judicata* and estoppel. Suffice it to say that in the circumstances of the present case the *ex parte* rent decree and the subsequent proceedings furnish a strong piece of evidence in favour of the case of the Defendant and they go to strengthen the presumption flowing from the Record of Rights as regards the shares of the parties. Even though they are as in the possession of the respective parties as recorded in the Record of Rights are not in proportion to the shares of the parties as recorded therein, pective parties as recorded in the Record of Rights are not in may be that Ahladimani a village woman could not, owing to various reasons, be in possession according to her true share.

Considering all the circumstances, I am of opinion that the lower courts were not right in holding that the presumption flowing from the Records of Rights has been rebutted. In the result therefore the Plaintiffs are not entitled to a decree on the footing that their share is two-thirds and not half in the disputed *jama* of Rs. 5/10/-.

In the result the appeal is allowed with costs, the judgments and decrees of the lower courts are set aside and the suit is dismissed.

P.K.D.

Appeal allowed.

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REVIEWS.

A Treatise on Vendor & Purchaser by Shambhudas Mitra, Advocate, published by Eastern Law House Limited, Calcutta-13, 1953; Price Rs. 12-8-0.

This is the first book of its kind so far as this country is concerned, and having regard to the excellent manner in which its subject-matter has been treated, it can safely be predicted that ere long it would come to occupy a very prominent place amongst the notable legal publications of the country. After the classical work on the same subject by Dart, any venturesome undertaking to write any book on this branch of the law was almost unthinkable. But Dart's monumental work being based mostly on the English law, which, in respect of many material particulars, differs from the codified law of India, a blind reliance on that work has on occasions led to judicial interpretations of law at variance with the Indian Statutes e.g. *Doyal Singh v. Indar Singh* (1), *Skinner v. Skinner* (2). The learned author of the book under review seems to be alive to this fact and has realised that an Indianised treatment of the subject in the light of the local statutes would be more useful than any foreign publication containing no reference to the state of the law prevalent here. In the short compass of this book the learned author has admirably succeeded in giving a complete picture of the law relating to vendors and purchasers. In doing so, he has not confined himself to the relevant provisions of the Transfer of Property Act alone but has pertinently drawn upon the provisions of the connected or sister statutes. The whole subject has been scientifically classified under different heads and the law under each head has been analytically and also at the same time tersely and pointedly stated in logical

(1) (1926) 58 I.A. 114=44 C.L.J. 397=51 C.W.N. 125 (P.C.).

(2) (1939) 56 I.A. 563=52 C.L.J. 487 (P.C.).

sequence and in evolutionary form. In clarity of conception, perspicuity of expressions and picturesqueness of presentation, no detraction or deterioration is visible in any part of the book. The whole law dealt with in the book being statutory, equity rules and principles have very little application in connection with the same, and the learned author has very wisely refrained from making much fetish of them quite unlike his foreign compeers. Himself being a draftsman and a conveyancer, the learned author has bestowed an extra degree of attention on deed-drafting and has clearly shown how the different parts of a deed, its style, pre-ambles, testatum, havendum, testimonium should be shaped. It is a pity that the archaic forms of deed-drafting prevalent in the feudal days of England have survived to a great extent even today notwithstanding the simplification of the matter by the Law of Property Act, 1925, of England and have penetrated in this country even notwithstanding our present Transfer of Property Act. The learned author has mustered courage in both hands and recommended considerable pruning of the old Shibboleths of conveyancing but it is doubtful if the professional interest of the *acting* section functioning under the dual system of the legal profession will permit any attention being ever paid to the suggestions of the learned author. We heartily desire the publication a glorious career.

A Short Guide to the Criminal Procedure Code by B. C. Patnaik, published by Cuttack Law Times, Cuttack-2, 1953. Price Rs. 2/-.

This short Guide to the Code of Criminal Procedure, though very small in bulk, is really a stupendous achievement in one's contribution to the legal literature of the country. It will be no exaggeration to describe this brochure as a very successful extraction of the very essence of the entire procedural law applied and made use of in the administration of criminal justice to the people of the Indian Union. The learned author has very carefully studied the 565 sections of the Criminal Procedure Code and well analysed and dissected the same and found that the whole Code substantially deals with sixty-two subjects or topics, which he has serially specified in the Contents of his book and successively dealt with the same in the pages of this

small volume, keeping his eyes always fixed on the essential principles on which the detailed rules as prescribed in the different sections of the Code have been founded. The beginners in the legal profession would do well to glance through the book before embarking on a laborious study of the Code itself. The law has been stated in the book in an extremely easy and comprehensible manner and no one will have any difficulty in understanding and remembering the same important decisions have very aptly been utilised in explaining and clarifying the law. The whole book is virtually a picturesque representation of the entire procedural law of the Criminal Courts. The treatment in the book is so fascinating that matters dealt with in it will adhere to one's memory without any effort. We can unhesitatingly recommend it to one and all for whom it has been designed. Even the advanced lawyers will find the book useful for the purpose of rivetting the essentials of law on their mind for ready application in the Course of Criminal trials.

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REVIEW.

The Insurance Act, 1938 and the Law of Insurance by A. K. Bhattacharjee, Barrister-at-Law, published by the Eastern Law House Ltd., Law Publishers, 54, Ganesh Chunder Avenue, Calcutta, Price Rs. 14/-.

We welcome this treatise on Insurance Law and the commentary on the Insurance Act, 1938 which has had no less than Eleven Amendments. Difficulty has immensely been felt so far by all concerned in finding the up-to-date Sections of the Act and also of the Insurance Rules, 1939. The learned author and the publishers are to be congratulated for bringing out this volume and meeting the needs of the profession, as well of commercial men, connected with Insurance.

Part I contains the commentary on the Insurance Act. Part II contains the Law of Insurance and its relation to Arbitration, Income Tax, Estate Duty, Motor Vehicles, Accidents, Marine, Fire and Life Insurance. Up-to-date case-laws have been incorporated, as far as possible.

The Author, as he says in his Preface, has had certain opportunities of gaining knowledge and gathering experience in practical Insurance law by being in touch with the day-to-day working of an Insurance Organisation. He has utilised that experience and knowledge in the preparation of this Book. The author is not new to us. We have had the pleasure of going through his prior publications on the West Bengal Premises Rent Control Act, 1948, and also 1950. These were tiny but timely publications and served the profession well. His small book on the Industrial Disputes Act, 1947 and his Students' Volumes on Mohamedan Law, Law of Persons, Contract, Equity and Jurisprudence have been of great aid to many.

Mr. Justice P. B. Mukherjee has written 'Foreward' to this present volume. To quote his Lordship's own words.

"The learned author has arranged his book in a very methodical way and with great care and industry. India is a land of Statutes. The Insurance Act, therefore, finds the place in the book and quite rightly. The treatment of its various sections in the book is fairly exhaustive and very helpful. The Law of Insurance is treated separately in Part II of the book by the author. In assimilation of the law, in discussing various precedents, in the range of the law covered, and in the method of presentation this part is a fine achievement. It not only deals with the general law of insurance but also, particular insurance like the marine, insurance, the fire insurance, the life insurance, the accident insurance and the motor vehicle insurance. Of particular interest is the discussion in this part on the impact of law of insurance on taxation. I have read with great interest the chapters on Insurance and Income Tax and Insurance and Estate Duty. The discussion of the case law is very readable and avoids unnecessary prolixity.

The learned author has focussed attention of the readers on some aspects of the interesting jurisprudence of insurance law. I hope it will not only be useful to the profession for the practical work in the Courts but also to the business offices in their practical management dealing with insurance. It will do more than its usual service as a text book on the subject if it also serves to stimulate interest in the law of insurance.

Most respectfully, we join with the Lordship in his appreciation of this work.

The get-up of the Book is also excellent.